

MT LEGISLATIVE HISTORY

Chapter 432 1985

Bill H (S) 91

Original bill & hist. ✓ C

H. Committee on Judiciary

S. Committee on Judiciary

Hearing Date(s) Mar 07 ✓ C

Hearing Date(s) Jan 22 ✓ C

Mar 08 ✓ C

 C

 C

Date Out Mar 08 ✓ C

Jan 22 ✓ C

Did this bill originate in an interim committee? Yes No

Committee

Report

SENATE BILL NO. 91

INTRODUCED BY MAZUREK

BY REQUEST OF THE MONTANA SUPREME COURT AND THE MONTANA
SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE

IN THE SENATE

January 11, 1985	Introduced and referred to Committee on Judiciary.
January 22, 1985	Committee recommend bill do pass. Report adopted.
January 23, 1985	Bill printed and placed on members' desks.
January 24, 1985	Second reading, do pass.
January 25, 1985	Considered correctly engrossed.
January 26, 1985	Third reading, passed. Ayes, 46; Noes, 0.
	Transmitted to House.

IN THE HOUSE

January 28, 1985	Introduced and referred to Committee on Judiciary.
March 9, 1985	Committee recommend bill be concurrent in as amended. Report adopted.
March 13, 1985	Motion pass consideration.
March 14, 1985	Second reading, concurred in.
March 16, 1985	Third reading, concurred in.
	Returned to Senate with amendments.

IN THE SENATE

March 16, 1985	Received from House.
March 21, 1985	Second reading, pass consideration until 64th Legislative Day.
March 25, 1985	Passed consideration.
March 27, 1985	Second reading, amendments concurred in.
March 29, 1985	Third reading, amendments concurred in. Ayes, 49; Noes, 0. Sent to enrolling. Reported correctly enrolled.

1 Senate BILL NO. 91
2 INTRODUCED BY Mazurk
3 BY REQUEST OF THE MONTANA SUPREME COURT AND THE MONTANA,
4 SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE
5
6 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
7 CLARIFY THE PROVISIONS RELATING TO VENUE BY DEFINING WHAT
8 COUNTY IS A PROPER PLACE OF TRIAL FOR VARIOUS PARTIES AND
9 CIVIL ACTIONS; AMENDING SECTIONS 2-9-312, 25-2-101 THROUGH
10 25-2-106, AND 25-2-108, MCA; AND REPEALING SECTION 25-2-107,
11 MCA."
12
13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
14 NEW SECTION. Section 1. Scope of part. The proper
15 place of trial (venue) of a civil action is in the county or
16 counties designated in this part.
17 NEW SECTION. Section 2. Designation of proper place
18 of trial not jurisdictional. The designation of a county in
19 this part as a proper place of trial is not jurisdictional
20 and does not prohibit the trial of any cause in any court of
21 this state having jurisdiction.
22 NEW SECTION. Section 3. Power of court to change
23 place of trial. The designation in this part of a proper
24 place of trial does not affect the power of a court to
25 change the place of a trial for the reasons stated in

1 25-2-201(2) or (3), or pursuant to an agreement of the
2 parties as provided in 25-2-202.

3 NEW SECTION. Section 4. Right of defendant to move
4 for change of place of trial. If an action is brought in a
5 county not designated as the proper place of trial, a
6 defendant may move for a change of place of trial to a
7 designated county.

8 NEW SECTION. Section 5. Multiple proper counties. If
9 this part designates more than one county as a proper place
10 of trial for any action, an action brought in any such
11 county is brought in a proper county and no motion may be
12 granted to change the place of trial upon the ground that
13 the action is not brought in a proper county under
14 25-2-201(1). If an action is brought in a county not
15 designated as a proper place of trial, a defendant may move
16 for a change of place of trial to any of the designated
17 counties.

18 NEW SECTION. Section 6. Multiple claims. In an action
19 involving two or more claims for which this part designates
20 more than one as a proper place of trial, a party entitled
21 to a change of place of trial on any claim is entitled to a
22 change of place of trial on the entire action, subject to
23 the power of the court to separate claims or issues for
24 trial under Rule 42(b) of the Montana Rules of Civil
25 Procedure.

NEW SECTION. Section 7. Multiple defendants. If there are two or more defendants in an action, a county that is a proper place of trial for any defendant is proper for all defendants, subject to the power of the court to order separate trials under Rule 42(b) of the Montana Rules of Civil Procedure. If an action with two or more defendants is brought in a county that is not a proper place of trial for any of the defendants, any defendant may make a motion for change of place of trial to any county which is a proper place of trial.

Section 8. Section 25-2-108, MCA, is amended to read:

"25-2-108. ~~Other--actions~~ Residence of defendant. In ~~all other--cases,--the--action--shall--be--tried--in~~ Unless otherwise specified in this part:

(1) the proper place of trial for all civil actions is the county in which the defendants or any of them may reside at the commencement of the action or where the plaintiff resides and the defendants or any of them may be found; or

(2) if none of the defendants reside in the state, or, if residing in the state, the county in which they so reside be--unknown--to--the--plaintiff,--the--same--may--be--tried--in--any county which the plaintiff may designate in--his--complaint, subject,--however,--to--the--power--of--the--court--to--change--the place of trial as provided in this code the proper place of trial is any county the plaintiff designates in the

complaint."

Section 9. Section 25-2-101, MCA, is amended to read:

"25-2-101. ~~Contract-actions~~ Contracts. Actions (1) The proper place of trial for actions upon contracts may be tried in is either:

(a) the county in which the defendants, or any of them, reside at the commencement of the action; or

(b) the county in which the contract was to be performed, subject, however, to the power of the court to change the place of trial as provided in this code. The county in which the contract was to be performed is:

(i) the county named in the contract as the place of performance; or

(ii) if no county is named in the contract as the place of performance, the county in which, by necessary implication from the terms of the contract, considering all of the obligations of all parties at the time of its execution, the principal activity was to take place.

(2) Subsections (2)(a) through (2)(d) do not constitute a complete list of classes of contracts; if, however, a contract belongs to one of the following classes, the proper county for such a contract for the purposes of subsection (1)(b)(ii) is:

(a) contracts for the sale of property or goods; the county where possession of the property or goods is to be

1 delivered;

2 (b) contracts of employment or for the performance of
3 services: the county where the labor or services are to be
4 performed;

5 (c) contracts of indemnity or insurance: the county
6 where the loss or injury occurred or where a judgment is
7 obtained against the assured or indemnitee or where payment
8 is to be made by the insurer;

9 (d) contracts for construction or repair: the county
10 where the object to be constructed or repaired is situated
11 or is to be built."

12 Section 10. Section 25-2-102, MCA, is amended to read:

13 "25-2-102. ~~Tort-actions~~ Torts. Actions--for-torts--may
14 be--tried-in-the The proper place of trial for a tort action
15 is:

16 (1) The county in which the defendants, or any of
17 them, reside at the commencement of the action; or

18 (2) The county where the tort was committed;--subject;
19 however,--to-the-power-of-the-court-to-change--the--place--of
20 trial--as-provided-in-this-code. If the tort is interrelated
21 with and dependent upon a claim for breach of contract, the
22 tort was committed, for the purpose of determining the
23 proper place of trial, in the county where the contract was
24 to be performed."

25 Section 11. Section 25-2-103, MCA, is amended to read:

1 "25-2-103. ~~Actions--involving--real~~ Real property. (1)
2 Actions The proper place of trial for the following causes
3 must--be-tried-in actions is the county in which the subject
4 of the action or some part thereof is situated;--subject--to
5 the--power--of--the--court--to--change-the-place-of-trial-as
6 provided-in-this-code:

7 (a) for the recovery of real property or of an estate
8 or an interest therein or for the determination, in any
9 form, of such right or interest;

10 (b) for injuries to real property;

11 (c) for the partition of real property;

12 (d) for the foreclosure of all liens and mortgages on
13 real property.

14 (2) Where the real property is situated partly in one
15 county and partly in another, the plaintiff may select
16 either of the counties and the county so selected is the
17 proper county for the trial of such action.

18 (3) ~~All~~ The proper place of trial for all actions for
19 the recovery of the possession of, quieting the title to, or
20 the enforcement of liens upon real property must--be
21 commenced-in is the county in which the real property, or
22 any part thereof, affected by such action or actions is
23 situated."

24 Section 12. Section 25-2-104, MCA, is amended to read:

25 "25-2-104. Actions-to-recover Recovery of statutory

penalty or forfeiture. ~~Actions~~ The proper place of trial for the recovery of a penalty or forfeiture imposed by statute ~~must-be-tried-in~~ is the county where the cause or some part thereof arose, ~~subject-to-the-power-of-the-court-to-change the-place-of-trial~~, except that when it is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream and opposite to the place where the offense was committed."

Section 13. Section 25-2-105, MCA, is amended to read:

"25-2-105. ~~Actions--against~~ Against public officers or their agents. ~~Actions~~ The proper place of trial for an action against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who, by his command or in his aid, does anything touching the duties of such officer ~~must-be-tried-in~~ is the county where the cause or some part thereof arose, ~~subject-to-the-power-of-the-court to-change-the-place-of-trial~~."

Section 14. Section 25-2-106, MCA, is amended to read:

"25-2-106. ~~Actions-against~~ Against counties. ~~An~~ The proper place of trial for an action against a county ~~may-be commenced-and-tried-in--such~~ is that county unless such action is brought by a county, in which case ~~it-may-be commenced-and-tried-in~~ any county not a party thereto is

also a proper place of trial."

Section 15. Section 2-9-312, MCA, is amended to read:

"2-9-312. ~~Venue-of-actions~~ Against state and political subdivisions. (1) Actions The proper place of trial for an action against the state ~~shall-be-brought~~ is in the county in which the ~~cause-of-action~~ claim arose or in Lewis and Clark County. In ~~addition~~, an action brought by a resident of the state, ~~may-bring-an--action--in~~ the county of his residence is also a proper place of trial.

(2) ~~Actions~~ The proper place of trial for an action against a political subdivision ~~shall-be-brought~~ is in the county in which the ~~cause-of-action~~ claim arose or in any county where the political subdivision is located."

NEW SECTION. Section 16. Specific statutes control. The provisions of this part do not repeal, by implication or otherwise, specific statutes not within this part, designating a proper place of trial, whether or not such a designation is called venue or proper place of trial.

NEW SECTION. Section 17. Repealer. Section 25-2-107, MCA, is repealed.

NEW SECTION. Section 18. Codification instruction.

(1) Sections 1 through 7 and 16 are intended to be codified as an integral part of Title 25, chapter 2, part 1, and the provisions of Title 25, chapter 2, part 1, apply to sections 1 through 7 and 16.

1 (2) Section 2-9-312 is intended to be recodified as an
2 integral part of Title 25, chapter 2, part 1, and the
3 provisions of Title 25, chapter 2, part 1, apply to 2-9-312
4 as recodified.

-End-

NORMAL SCHEDULE==> SITE: OLD SUPREME COURT ROOM DAYS: M-TU-W-TH-F TIME: 10:00 A.M.-12 NOON

BILL NO	REFER DATE	HEARING DATE	CONSIDERATION DATES	COMMITTEE ACTION	REREFERRED TO COMM	DATE OUT
SB0060	1/07	1/23		PASS AS AMENDED		1/23
MAZUREK, JOSEPH P.				REPLACE UNIFORM GIFTS TO MINORS ACT WITH UNIFORM TRANSFERS TO MINORS ACT		
SB0063	1/07	1/21	1/22 2/23	TABLED		2/6
HALLIGAN, MIKE				VALIDATE CONTRACT CLAUSES REQUIRING ARBITRATION		
SB0066	1/12	1/21	1/23	PASS AS AMENDED		1/25
HALLIGAN, MIKE				REQUIRING PLAIN LANGUAGE IN CONSUMER CONTRACTS		
SB0069	1/07	1/14 & 2/13	1/16 2/23	TABLED		2/18
GALT, JACK E.				EXTENDING RESERVED WATER RIGHTS COMPACT COMM'N AND REQUIRING STATUS REPORTS		
SB0085	1/10	1/16		PASS AS AMENDED		1/22
BROWN, BOB				CRIMINAL INTELLIGENCE INFORMATION UNIT		
SB0087	1/10	1/23		DO PASS		1/23
MAZUREK, JOSEPH P.				LIABILITY OF PARTNERS AND OTHERS UNDER UNIFORM LIMITED PARTNERSHIP ACT		
SB0089	1/11	1/23	1/23	PASS AS AMENDED		1/28
MAZUREK, JOSEPH P.				REVISING LAWS RELATING TO GARNISHMENT OF PERSONAL SERVICES EARNINGS		
SB0090	1/11	1/18	XXXX	PASS AS AMENDED		1/22
MAZUREK, JOSEPH P.				EXPANSION OF DISCOVERY IN CRIMINAL CASES		
✓ SB0091	1/11	1/22	1/22	DO PASS		1/22
MAZUREK, JOSEPH P.				GENERAL REVISION AND CLARIFICATION OF VENUE STATUTES		
SB0097	1/11	1/15	1/15 XXX 2/23	TABLED		1/17
CRIPPEN, BRUCE D.				AMEND CONSTITUTION TO RAISE DRINKING AGE TO 21 -- HIGHWAYS BILL		
SB0098	1/11	1/15	1/17 XXX 1/15, 2/23	TABLED		1/18
CRIPPEN, BRUCE D.				IMPLEMENT PROPOSED CONST. AMEND. RAISING DRINKING AGE TO 21-HIGHWAYS BILL		

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 22, 1985

The eleventh meeting of the Senate Judiciary Committee was called to order at 10:08 a.m. on January 22, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

Chairman Mazurek turned the chair over to Vice Chairman Daniels, as he was the chief sponsor of SB 91 to be heard before the committee.

CONSIDERATION OF SB 91: Senator Mazurek, sponsor of SB 91, stated this is an act to revise the venue statutes in the state of Montana. At the request of the Supreme Court, Senator Turnage introduced SJR 24 last session calling for a study by the Montana Supreme Court, in cooperation with the State Bar and the Legislative Council, to review the venue statutes. The problem which exists is the venue statutes were adopted in 1864 and have not been rewritten. This bill will bring the venue statutes into conformance with what the case law has determined them to be. The bill represents an attempt by the committee to clearly state the current state of the law.

PROPOSERS: Sam Haddon, a lawyer from Missoula and Chairman of the Montana Supreme Court Committee on Rules of Evidence, appeared in that capacity in support of the bill. He was there with the approval of the court and with its request that he appear in support. The work which the evidence commission undertook was the result of last session's SJR 24 which stated the court, through the commission, should undertake a study of the current statutes relating to venue. The current bill deals only with the venue provisions of that joint resolution. The initial work was undertaken by Professor Crowley. He distributed the commission's report, which indicated there are hundreds of cases on venue (see Exhibit 1). The purpose of the study the commission undertook was not to change the law, but to include as a first purpose within the code sections themselves the rules that have become settled over the years through the case law. The second purpose of the study was to update the language and clarify it in modern terminology. The third purpose was to clarify any areas where there seemed to be some ambiguity in the present state of the law. The bill came to the committee with the recommendation of the commission and with the approval of the court. William F. Crowley, Professor of Law at the University of Montana, stated he was the person mainly guilty for the form of the bill. In

drafting it, they tried to work carefully within the guidelines that were provided two years ago to simply put into the statutes what had been supplemented by the supreme court over the years and where the statutes were implemented to clarify it. The new sections at the beginning of the bill are basically things that the supreme court has held over the years but do not appear in the statutes themselves. Patrick E. Melby, representing the State Bar of Montana, stated he was there to lend the Bar's whole-hearted support of the bill, as they feel it is excellently drafted. They think the summary (Exhibit 1) explains the proposed changes very well. (See witness sheet attached as Exhibit 2.)

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Pinsoneault asked if we were talking about civil matters--we do not address criminal matters in this bill. Mr. Haddon stated that was correct. Senator Towe asked Professor Crowley if the purpose of the bill was not to make any substantive changes in the venue laws but to codify the existing situation. Senator Towe expressed a concern with page 3, lines 12-18 of the bill, where the language "or where the plaintiff resides and the defendants or any of them may be found" has been deleted. Professor Crowley stated the provision that is stricken that is one of the changes which was discussed at some length at their meetings. That provision was only before the Supreme Court once in all of the years it was there, and it resulted in a 3 to 2 decision because the dissenting judges said this is a provision that could be extremely conducive to fraud. There was an enormous dissent written on the case. The only cases they could find where lawyers are currently using it are in domestic relations cases.

CLOSING STATEMENT: Senator Mazurek stated Exhibit 1 is a very detailed explanation of the case law behind the bill.

Hearing on SB 91 was closed.

ACTION ON SB 85: Senator Towe moved the committee adopt the amendments proposed by the Attorney General (Exhibit 3). The motion carried unanimously. Mr. Petesch indicated the bill needed a statement of intent. Senator Shaw moved the committee recommend the bill DO PASS AS AMENDED. The motion carried unanimously. Senator Towe moved the statement of intent (Exhibit 4) be added to the bill. The motion carried unanimously.

ACTION ON SB 91: Senator Crippen moved the committee recommend SB 91 DO PASS. Karl Englund, on behalf of the Montana Trial Lawyers Association, stated he had reviewed the bill and stated they had no objection to it. The motion carried unanimously.

Recommendations for Revisions in Venue Statutes
Prepared by the Montana Supreme Court Commission
on the Rules of Evidence

PREFACE

This report and the accompanying draft bill are submitted to partially fulfill the request of Senate Joint Resolution 24 of the 48th Legislature that the Supreme Court Commission on the Rules of Evidence prepare draft legislation for submission to the 49th Legislature to provide that "statutory provisions on venue . . . accurately reflect the current usages and interpretations of those laws"

The Resolution recognized that the existing statutes "no longer reflect on their face the present state of the law," and expressed a desire that new draft statutes be prepared incorporating the "logical, useful, and consistent" rules and practices which have evolved by judicial construction of the present laws.

The current venue statutes were adopted in 1864 at Bannack and are substantially the same today as when they were enacted. Throughout the 120 years of their existence these venue statutes have been the subject of dozens, perhaps hundreds, of appeals to the Montana Supreme Court. Many of the appeals were caused by the silence of the statutes on principles necessary to their operation; other appeals resulted from the ambiguity of certain fundamental language. The commands of various venue sections that particular kinds of cases "shall," "may," or "must" be tried in specified counties resulted in seemingly unending litigation. Concerning one of these sections, Justice Sheehy, writing for a unanimous court, complained in 1978:

Possibly no statute has spawned more litigation in this state than section 93-2904 relating to the proper place of trial. Year after year we are called upon to interpret anew what are seemingly simple code provisions and to explain again the impact of our decisions under the statute. (Clark Fork Paving, Inc. v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779.)

Justice Sheehy went on to extract, from what he termed "the mountain of cases which have arisen," the long-standing rules that decided the issue, and restated them for the thirtieth or fortieth time.

The Clark Fork case illustrates the fundamental problem: basic rules exist but many cannot be found in the statutes. They must be located in, and sifted from, a "mountain of cases." When attorneys have not found the applicable Supreme Court opinion in the 190-odd volumes of Montana Reports (or hope that their opponents have not), the same legal questions are hauled before the Court again and again and again.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 1

DATE 01/22/85

BILL NO. 113

The new statutes proposed in this draft have three objectives:

(1) to include in the Montana Code Annotated those rules which have been declared and are settled by the Supreme Court but are not now stated in the Code;

(2) to change the language, without changing the meaning, of the sections that have caused the most litigation (primarily by substituting the designation "proper place of trial" for the ambiguous command that cases "shall," "may," or "must" be tried in particular counties);

(3) to settle the few matters where there is still a seeming ambiguity, following general principles along the lines that the Court seems to feel would be best derived from what the Court has held in other situations.

1 NEW SECTION. Section 1. Scope of part. The proper
2 place of trial (venue) of a civil action is in the county or
3 counties designated in this part.

Explanation: The only purpose of this section is clarity. It is simply an expression of the fundamental principle incorporated but unstated in the present Code and its predecessors.

1 NEW SECTION. Section 2. Designation of proper place
2 of trial not jurisdictional. The designation of a county in
3 this part as a proper place of trial is not jurisdictional
4 and does not prohibit the trial of any cause in any court of
5 this state having jurisdiction.

Explanation: This new section is intended to codify the results of a series of cases dealing with recurrent problems caused by the form and language of the current statutes. Although intended

only to set rules of venue, the phrasing of the present statutes has caused many litigants to believe they prescribe jurisdictional requirements. The Supreme Court has had to rule repeatedly that these statutes do not in any way affect the jurisdiction of District Courts to try cases brought before them. All District Courts have equal power to try any action of which the district courts, as a group, have jurisdiction (Miller v. Miller, ___ Mont. ___, 616 P.2d 313 (1980); State ex rel. Foster v. Mountjoy, 83 Mont. 162, 271 P. 446 (1928)). Even if a court is not the proper one as designated by the venue statutes, it can try a case if there is no objection from a party through a motion for a change of venue (Miller v. Miller, supra; Bullard v. Zimmerman, 82 Mont. 434, 268 P. 512 (1928)). Unless there is a demand by one of the parties, a court is not authorized to order the case transferred to another county or to refuse to try the case (State ex rel. Gnose v. District Court, 30 Mont. 188, 75 P. 1109 (1904); Danielson v. Danielson, 62 Mont. 83, 203 P. 506 (1921)).

Since these questions have arisen repeatedly over a long period of time, it seems sensible to include this or a similar provision to prevent endless recurrences in the future.

1 NEW SECTION. Section 3. Power of court to change
2 place of trial. The designation in this part of a proper
3 place of trial does not affect the power of a court to
4 change the place of a trial for the reasons stated in
5 25-2-201(2) or (3), or pursuant to an agreement of the
6 parties as provided in 25-2-202.

Explanation: This section is simply a consolidation into a single section a principle now expressed separately and not very clearly in each statute. Every venue statute now, after designating the proper county or counties for particular purposes, includes a provision that it is "subject, however, to the power of the court to change the place of trial as provided in this code." The Supreme Court has had to state on many occasions that the clause is intended only to preserve the trial courts' discretionary power of granting changes of venue to secure impartial trials or to promote convenience of witnesses or the ends of justice. The proposed section incorporates these declarations and should make the meaning clear.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 1

DATE 01.22.85

BILL NO. SB 9

1 NEW SECTION. Section 4. Right of defendant to move
2 for change of place of trial. If an action is brought in a
3 county not designated as the proper place of trial, a
4 defendant may move for a change of place of trial to a
5 designated county.

Explanation: This section and section 5 specify that the right to move for a change of place of trial on the ground that the action is brought in the wrong county belongs exclusively to a defendant. It might be argued that this right should extend to some other classes of litigants, such as involuntary plaintiffs under Rule 19(a), M.R.Civ.P. or some intervenors (Rule 24, M.R.Civ.P.). The courts have always held that such parties must accept the status of the ongoing action as they find it at the time of their entry. Further, Rule 12(b)(ii), M.R.Civ.P. provides that only defendants can move for a change of venue on this ground, which is consistent with all of the Supreme Court holdings.

1 NEW SECTION. Section 5. Multiple proper counties. If
2 this part designates more than one county as a proper place
3 of trial for any action, an action brought in any such
4 county is brought in a proper county, and no motion may be
5 granted to change the place of trial upon the ground that
6 the action is not brought in a proper county under
7 25-2-201(1). If an action is brought in a county not
8 designated as a proper place of trial, a defendant may move
9 for a change of place of trial to any of the designated
10 counties.

Explanation: Present statutes do not deal with this situation.

This section codifies a number of Supreme Court holdings that do. In many cases (particularly tort and contract actions) alternative venues are authorized, but the manner of choosing between them is not stated. A sizeable amount of litigation has resulted. All of the cases have held that the plaintiff has the initial choice and, if he selects a county that is proper, the issue is closed, but that if the plaintiff files the action in a county that is not one of those designated, he has waived the right to choose, which passes to the defendant. Defendant can then decide to which of the proper counties he wants the case transferred. Of the many cases dealing with the problem, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958), a tort action, gives the clearest statement:

In this case the statute means that either the county of defendant's residence or the county where the tort was committed is a proper county for the trial of the action, and had the plaintiff chosen either of those counties, the defendant could not have had it removed.

In this case plaintiff waived his right to have it tried in one of the proper counties. Therefore, the defendant has the right upon proper demand to have the place of trial changed either to the county where he resides or to the county where the tort was committed, whichever he elects.

This proposed section will preserve the rule of Seifert and other cases. It allows the plaintiff first choice among the proper venues and provides that a correct choice by him cannot be changed. If the plaintiff's selection is not one of the designated counties, the initiative passes to the defendant. He can move for a change to the proper county of his choice, and section 25-2-201 MCA requires that the trial court grant the motion.

1 NEW SECTION. Section 6. Multiple claims. In an action
2 involving two or more claims for which this part designates
3 more than one as a proper place of trial, a party entitled
4 to a change of place of trial on any claim is entitled to a
5 change of place of trial on the entire action, subject to
6 the power of the court to separate claims or issues for

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 1

DATE 01/22/85

BILL NO. 513 26

7 trial under Rule 42(b) of the Montana Rules of Civil
8 Procedure.

Explanation: The present statutes do not cover this situation. This section codifies the holdings of the Supreme Court in cases that have raised the question. Our statutes have no provision for the multiple claim situation in which the county where the plaintiff files is correct on one claim but not for one or more of the others. It is possible, at least since the adoption of Rule 42(b), for a court to split the action and grant a change on one or more claims, but this causes multiple trials and may be a cure worse than the disease. For a great many years our Court has ruled consistently that a defendant entitled to a change of venue on one claim should have it on the entire action. The Court feels the rule is necessary to prevent a plaintiff from controlling venue by adding spurious claims that have little or no validity, but are triable in the forum the plaintiff chooses rather than at the normal situs which would be the defendant's residence or another location more favorable to the defendant.

This new provision codifies the result of this unbroken line of opinions: Yore v. Murphy, 10 Mont. 304, 25 P. 1039 (1891); Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933); Beavers v. Rankin, 142 Mont. 570, 385 P.2d 640 (1963). It makes no change in existing law, but simply enacts it into the Code where it is available.

1 NEW SECTION. Section 7. Multiple defendants. If there
2 are two or more defendants in an action, a county that is a
3 proper place of trial for any defendant is proper for all
4 defendants, subject to the power of the court to order
5 separate trials under Rule 42(b) of the Montana Rules of
6 Civil Procedure. If an action with two or more defendants is
7 brought in a county that is not a proper place of trial for
8 any of the defendants, any defendant may make a motion for
9 change of place of trial to any county which is a proper
10 place of trial.

Explanation: On a few occasions, the Supreme Court has had to deal with the problem posed by multiple defendants with conflicting venue rights. Most situations involve defendants who live in different counties, but this presents no difficulty since the statutes (Section 25-2-108 MCA; amended in section 7 of this draft) have always allowed the plaintiff to file at the residence of any of them. Tort, contract, and real property actions, however, which present choices other than residence, have been troublesome. Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933) raised but did not give a definitive answer to the question of possible priorities between defendants whose venue rights arise under different statutory provisions. That case involved contract, tort, and real property claims, and was brought at the plaintiff's residence where none of the defendants lived. The Court held that the action was basically one for recovery of real property, to which the tort and contract claims were subsidiary. Since all of the defendants were residents of the county where the land was situated, a change of venue to that county was awarded. The court noted that small differences in the facts might have presented much more complex questions. These questions are what this proposed section attempts to meet. The section would simply extend the same "good as to one, good as to all" principle that has always governed venue based on residence to all situations. Rule 42(b), which was not available at the time of the Heinecke case, could be used to alleviate the difficulties of a defendant placed at a real disadvantage.

This proposed section does not change existing law or establish any new principle. Like the other new provisions it simply tries to codify existing case law (although, in this instance, cases are neither plentiful nor clear-cut) so that all the fundamental principles will be gathered together in one place and stated as plainly as possible.

- 1 Section 8. Section 25-2-108, MCA, is amended to read:
- 2 "25-2-108. ~~Other--actions~~ Residence of defendant. In
- 3 ~~all other--cases,--the--action--shall--be--acted--in~~ Unless
- 4 otherwise specified in this part:
- 5 (1) the proper place of trial for all civil actions is
- 6 the county in which the defendants or any of them may reside

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7 at the commencement of the action ~~or where the plaintiff~~
8 ~~resides and the defendants or any of them may be found; or~~
9 (2) if none of the defendants reside in the state, ~~or~~
10 ~~if residing in the state, the county in which they so reside~~
11 ~~be unknown to the plaintiff, the same may be tried in any~~
12 ~~county which the plaintiff may designate in his complaint,~~
13 ~~subject, however, to the power of the court to change the~~
14 ~~place of trial as provided in this code~~ the proper place of
15 trial is any county the plaintiff designates in the
16 complaint."

Explanation: This revised section changes the location and arrangement of the most basic rules but does not alter their content significantly. Currently, section 25-2-108, which states the most fundamental of all venue rules--that the defendant has the right to have the trial in his county of residence--is the last section in Part 1, Chapter 2, Title 25, preceded by a long list of exceptions to it. The sequence is confusing and has caused much needless litigation. This revision tries to put first things first, beginning with the most fundamental proposition, and following it with the exceptions.

Subsection (1). This subsection extracts from the confusing welter of statutes what the Supreme Court has repeatedly called the "principal rule" of venue (see Hardenburgh v. Hardenburgh, 115 Mont. 46, 146 P.2d 151 (1944); Love v. Mon-O-Co Oil Corp., 133 Mont. 56, 319 P.2d 1056 (1957); Clark Fork Paving v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779 (1978)) and places it at the beginning, rather than the end, of the related group of rules. The proper relationship between this principle and others that are subordinate to it has generated most of what Justice Sheehy, in Clark Fork Paving, called the "mountain of cases" that the present statutes have spawned. This new order and placement is intended to emphasize the pre-eminence of this rule and the Court's repeated insistence upon it.

The stricken material "or where the plaintiff resides and the defendants or any of them may be found" at the end of subsection (1) is part of the current rule, but, in the judgment of the Commission, should be eliminated entirely. This deletion constitutes a substantive change in current law, the only such change in the draft bill. Unlike the fundamental principle to which it

It should be noted that subsection (2) applies only to the nonresident and does not affect the rights of a resident who may be joined as co-defendant with the nonresident. The resident retains whatever rights he may have to a venue change (Foley v. General Motors Corp., supra).

The stricken language providing for designation of a proper county by a plaintiff was deleted as redundant with section 4. A plaintiff, whether he knows the residence of the defendant or not, may file in any county subject to defendant's right to move the trial.

1 Section 9. Section 25-2-101, MCA, is amended to read:

2 "25-2-101. ~~Contract-actions~~ Contracts. Actions (1) The
3 proper place of trial for actions upon contracts may be
4 tried-in is either:

5 (a) the county in which the defendants, or any of
6 them, reside at the commencement of the action; or

7 (b) the county in which the contract was to be
8 performed, subject, however, to the power of the court to
9 change the place of trial as provided in this code. The
10 county in which the contract was to be performed is:

11 (i) the county named in the contract as the place of
12 performance; or

13 (ii) if no county is named in the contract as the place
14 of performance, the county in which, by necessary
15 implication from the terms of the contract, considering all
16 of the obligations of all parties at the time of its
17 execution, the principal activity was to take place.

18 (2) Subsections (2)(a) through (2)(d) do not
19 constitute a complete list of classes of contracts; if,
20 however, a contract belongs to one of the following classes,
21 the proper county for such a contract for the purposes of
22 subsection (1)(b)(ii) is:

23 (a) contracts for the sale of property or goods: the
24 county where possession of the property or goods is to be
25 delivered;

26 (b) contracts of employment or for the performance of
27 services: the county where the labor or services are to be
28 performed;

29 (c) contracts of indemnity or insurance: the county
30 where the loss or injury occurs or where a judgment is
31 obtained against the assured or indemnitee or where payment
32 is to be made by the insurer;

33 (d) contracts for construction or repair: the county
34 where the object to be constructed or repaired is situated
35 or is to be built."

Explanation: Present section 25-2-101 was, until the recodification of 1979, part of section 93-2904, RCM 1947, which lumped together in a single paragraph the basic rule of venue and all its major exceptions. This was the provision about which Justice Sheehy said, in Clark Fork Paving v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779 (1978), "Possibly no statute has spawned more litigation in this state" The portion that has become section 25-2-101 was the focus of a major portion of that litigation.

The original intent of the "contract exception" to the general rule placing venue at the residence of the defendant was to permit an alternative place of trial. The plaintiff could, if he chose, elect to file his action in the county where the contract was to be performed rather than at defendant's residence. The

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Supreme Court, however, in Interstate Lumber Co. v. District Court, 54 Mont. 602, 172 P. 1030 (1918), held that the word "may" in the statute meant "must" and construed the provision to mean that contract actions were properly triable only in the county of performance. This decision, in conjunction with the earlier case of State ex rel. Coburn v. District Court, 41 Mont. 84, 108 P. 144 (1910), which had ruled that the place of performance of all contracts calling for payment of money was at the place of the payment, effectively established the venue of practically all contract actions at the plaintiff's, rather than the defendant's, residence. The Coburn and Interstate Lumber cases were overruled in Hardenburgh v. Hardenburgh, 115 Mont. 469, 146 P.2d 151 (1944) which decided that "may" means "may" rather than "must" and set out rules for determining the place of performance of various types of contracts that have been followed down to the present.

The last sentence of subsection (1)(b) and subsection 2) through the end of the section is an attempt to codify the results of an extensive line of cases dealing with the problems created by section 25-2-101, MCA, and its predecessor, particularly those cases struggling with the meaning of the "place of performance" language of the statutes.

The contract venue statutes since their beginning have clearly intended to allow alternative venues when a contract is to be performed in a county other than the one where the defendant lives, but they have not proven easy to apply. Although the Hardenburgh case got rid of an obviously erroneous interpretation that had robbed the alternative provision of much of its benefit, the decision did not settle all the problems. Determining the place where a contract is to be performed is frequently not an easy task. Most contracts call for a monetary payment of some sort, and when, under the Coburn and Interstate Lumber cases, this was made the single determinative factor, the location was normally clear. After those decisions were changed, that certainty disappeared. The Hardenburgh court, anticipating the difficulties that could result, laid down a succession of interpretive rules which have generally been followed and developed in later cases.

This portion of the section seeks to state the case rules in a form as brief and complete as possible although, in dealing with a series of court opinions that are lengthy and diverse, and extend over a period of 40 years, the rules are not always simple and clear.

The Hardenburgh rules establish a basic framework. If a contract specifies a place of performance, the matter is settled; the court's will accept the designation. Where the contract is not specific, the court will look to see whether the contract allows performance to occur only at a particular site. If so, that is the location "by necessary implication." Some of these determinations are reasonably simple, others complex. In the uncomplicated category are such cases as Colbert Drug v. Electrical Products, 106 Mont. 11, 74 P.2d 437 (1937) where the contract, although it did not specify any county as the place of perfor-

mance, was to maintain neon signs in Butte; Thomas v. Cloyd, 110 Mont. 343, 100 P.2d 938 (1940) in which the defendant contracted to secure employment for the plaintiff in Butte; and Love v. Mon-O-Co Oil, 133 Mont. 56, 319 P.2d 1056 (1958), an action on a contract to drill an oil well on a described tract of land which lay in Fallon county. In each case the Court found a county of performance specified by necessary implication.

Where both parties have duties and obligations which must be carried out at different locations, fixing the place of performance becomes more difficult. Before Hardenburgh, place of payment was the sole determining factor in most cases. After Hardenburgh, the court, in a search for a similar touchstone, experimented with a number of factors; place of negotiation, place of execution, place of payment, or some combination of them. Ultimately, it settled on the "county of activity," that is, the county where the primary purpose of the contract was to be accomplished.

Determining "county of activity" as outlined in the series of cases which fixed this as the test, involves several steps. It begins with a consideration of all the duties and obligations of all the parties (Hardenburgh); then the court seeks to determine the ultimate purpose to be achieved and decide which of the various acts are primary and which subsidiary to that purpose. The county where the primary actions are to be performed is the county of activity. The process was most clearly demonstrated in Brown v. First Federal Savings and Loan, 144 Mont. 149, 394 P.2d 1017 (1964), which also contains the clearest expression of the principle. The plaintiffs, residents of Lewis and Clark County, received a loan from the defendant loan association to build a house in Helena. The association's office was in Great Falls; the loan was made there, payments were to be received there, the contractors and subcontractors were to be supervised and paid from there, and all the financial activities performed there. The actual construction, however, was all in Lewis and Clark County. The plaintiffs' action was for breach of defendant's obligations to supervise and pay the contractors properly. Defendants claimed venue was in Cascade County because the suit concerned duties to be performed there. Plaintiffs maintained that the contract existed primarily to build a house in Lewis and Clark County, and that was the proper county of performance. The Supreme Court held for the plaintiffs, saying, in part, "The theatre of performance, by necessary implication of what the parties intended as evidenced by the terms of the contract, is Helena."

Brown is one of a number of cases holding that it is the overall purpose of the contract, not the particular provision that is in contest in the action, which governs venue. It is also one of a series, again beginning with Hardenburgh, which have decided what what is "necessarily implied" about performance of particular

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kinds of contracts. It is these rules that are set out in subsections (2)(a) through (2)(d) of the draft bill.

The lead-in to subsection (2) recognizes that the contracts named in the subsection are not an exclusive list of contracts, but merely those in which a rule has evolved. The Commission does not intend to require that all contracts somehow be pigeon-holed into one of the categories to establish venue. Contracts not within the list are subject to analysis under subsection (1)(b)(ii) to establish venue.

Subsection (2)(a) incorporates the holding of the Hardenburgh case, which involved the sale of a business and included real and personal, tangible and intangible property; McNussen v. Graybeal, 141 Mont. 571, 380 P.2d 575 (1963) dealing with sale of milk produced and gathered in Lake county but sold in Missoula (venue was held to be in Missoula county where delivery and sale was made); and Hopkins v. Scottie Homes, 180 Mont. 498, 591 P.2d 230 (1979) where a mobile home was financed and sold in Valley county for delivery and erection in Musselshell county (venue lay in Musselshell county where delivery was to be made and the home set up).

Subsection (2)(b) adopts the rule declared in Hardenburgh for employment contracts. The Hardenburgh decision specifically overruled the portion of State ex rel. Coburn v. District Court, 41 Mont. 84, 108 P. 145 (1910) which had held that the venue of any contract calling for payment of money was at the residence of the creditor, but adopted the holding of Coburn that the place of performance of a labor contract was the place where the labor or services were to be performed. No subsequent cases have dealt with the question, so the basic rule of Coburn and Hardenburgh is clearly in force and is expressed in this subsection.

Subsection (2)(c) sets out the "insurance and indemnity" rule expressed in Hardenburgh, Hartford Accident and Indemnity Co. v. Viken, 157 Mont. 93, 483 P.2d 266 (1971), and General Insurance Co. v. Town Pump, ___ Mont. ___, 640 P.2d 463 (1982). Hardenburgh did not deal with insurance, so its discussion of the subject is technically dictum, but the Court was trying to deal with all the implications of the basic change it had made by overruling the Coburn and Interstate Lumber cases. The later Hartford and General Insurance opinions adopted Hardenburgh's rationale and applied it to the insurance contracts at issue in those cases. Using the "principal activity" test of Brown v. First Federal, supra, the Court in Hartford ruled that the performance called for in an insurance or indemnity contract is payment by the insurer on the happening of the named contingency. General Insurance made this doctrine more specific by holding that the place of performance of an insurance contract covering property in a number of different locations was in the county where the particular property involved in the claim at issue was situated.

The language of subsection (2)(c) is taken from the opinions in the Hardenburgh and Hartford cases.

Subsection (2)(d) is the rule of Brown v. First Federal, supra. Brown dealt with a contract for the original construction of a building, but the conclusion seems inescapable that its rationale is equally applicable to repair contracts, so they are included.

Note: Not all of the cases construing the contract exception to the basic venue rule, even those beginning with Hardenburgh, are totally reconcilable. Considering their numbers, it would be a miracle if they were. This proposed section is based on the large majority of the cases, which includes all of those that are most detailed and thoroughly considered, holding that contract venue lies in the county where the principal activity is to take place. A few opinions seem to state that a contract can have more than one place of performance, depending on the part of the contract sought to be enforced or the purpose of the specific litigation. These cases ignore the statutory language referring to the county in which the contract was to be performed, and are an open invitation to continue the endless round of litigation that the contract exception has spawned in the past. The proposed section therefore presumes a single place of performance of any contract, located in the county of its principal activity.

This proposal would follow and reaffirm Hardenburgh, Brown, McNussen v. Graybeal, and Hopkins v. Scottie Homes, but reject the rule of Peenstra v. Berek, ___ Mont. ___, 614 P.2d 521, which held that a contract for sale of goods was divisible into separate performances by buyer and seller. Each was to occur in a different county--the seller was to deliver the goods in the buyer's county, and the buyer was to make payments in the seller's county. Since the seller's performance was complete and he had brought the action for payment, the Court said, venue lay in the county where the buyer was to perform by making payment. Peenstra casts doubt on the entire sequence of decisions since Hardenburgh and throws the law back into uncertainty. The proposed section rejects it and any other decisions based on a "multiple performance" concept.

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1 Section 10. Section 25-2-102, MCA, is amended to read:
2 "25-2-102. ~~Tort-actions~~ Torts. ~~Actions--for-torts--may~~
3 ~~be--tried-in-the~~ The proper place of trial for a tort action
4 is:
5 (1) The county in which the defendants, or any of
6 them, reside at the commencement of the action; or
7 (2) The county where the tort was committed, subject
8 ~~however, to the power of the court to change the place of~~
9 ~~trial--as provided in this code.~~ If the tort is interrelated
10 with and dependent upon a claim for breach of contract, the
11 tort is committed, for the purpose of determining the proper
12 place of trial, in the county where the contract was to be
13 performed."

Explanation: This section changes the form but not the substance of the tort exception to the basic venue rule, and adds, in the last sentence of subsection (2), the essence of the Supreme Court's holding in Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974).

The present language of section 25-2-102, like the identical wording of the contract exception, that the action "may be tried" in the county where the tort was committed, has contributed to the "mountain of cases" that Justice Sheehy complained of in the Clark Fork Paving case. The principal case, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958) followed the Hardenburgh interpretation--that the language was permissive and created an alternative to the basic rule that venue lies at the defendant's residence. This holding has not been seriously questioned since it was handed down. It accords with the contract cases and makes the interpretation uniform.

The problems that arose after Seifert were in fixing the situs of torts that involved no physical injury. Three times in 10 years the Supreme Court had to determine the county where torts would be held to be committed if they arose from a business relationship (Brown v. First Federal, supra; Foley v. General Motors, 159 Mont. 469, 499 P.2d 774 (1972); Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974)). The common factor in all the cases was the existence of a contract between the parties, out of which the tort was claimed to have sprung.

In Brown and Foley the question was not reached because other considerations were decisive, but the issue was central and squarely presented in Slovak. The Court decided that in tort actions arising from contractual relationships, the tort has the same situs, for venue purposes, as the contract.

This proposed section codifies the rules of Seifert and Slovak.

1 Section 11. Section 25-2-103, MCA, is amended to read:

2 "25-2-103. ~~Actions-involving-real~~ Real property. (1)

3 ~~Actions~~ The proper place of trial for the following ~~causes~~
4 ~~must-be-tried-in~~ actions is the county in which the subject
5 of the action or some part thereof is situated, ~~subject-to~~
6 ~~the-power-of-the-court-to--change--the--place--of--trial--as~~
7 ~~provided-in-this-code:~~

8 (a) for the recovery of real property or of an estate
9 or an interest therein or for the determination, in any
10 form, of such right or interest;

11 (b) for injuries to real property;

12 (c) for the partition of real property;

13 (d) for the foreclosure of all liens and mortgages on
14 real property.

15 (2) Where the real property is situated partly in one
16 county and partly in another, the plaintiff may select
17 either of the counties and the county so selected is the
18 proper county for the trial of such action.

19 (3) ~~At~~ The proper place of trial for all actions for

20 the recovery of the possession of, quieting the title to, or
21 the enforcement of liens upon real property ~~must---be~~
22 ~~commenced--in~~ is the county in which the real property, or
23 any part thereof, affected by such action or actions is
24 situated."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 12. Section 25-2-104, MCA, is amended to read:
2 "25-2-104. ~~Actions--to--recover~~ Recovery of statutory
3 penalty or forfeiture. ~~Actions~~ The proper place of trial for
4 the recovery of a penalty or forfeiture imposed by statute
5 ~~must--be--tried--in~~ is the county where the cause or some part
6 thereof arose, ~~subject-to-the-power-of-the-court--to--change~~
7 ~~the--place--of--trial,~~ except that when it is imposed for an
8 offense committed on a lake, river, or other stream of water
9 situated in two or more counties, the action may be brought
10 in any county bordering on such lake, river, or stream and
11 opposite to the place where the offense was committed."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 13. Section 25-2-105, MCA, is amended to read:
2 "25-2-105. ~~Actions-against~~ Against public officers or
3 their agents. ~~Actions~~ The proper place of trial for an
4 action against a public officer or person specially
5 appointed to execute his duties for an act done by him in
6 virtue of his office or against a person who, by his command
7 or in his aid, does anything touching the duties of such
8 officer ~~must--be--tried--in~~ is the county where the cause or
9 some part thereof arose ~~7-subject-to-the-power-of--the--court~~
10 ~~to-change-the-place-of-trial.~~"

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 14. Section 25-2-106, MCA, is amended to read:
2 "25-2-106. ~~Actions--against~~ Against counties. ~~An~~ The
3 proper place of trial for an action against a county ~~may--be~~
4 ~~commenced--and--tried--in--such~~ is that county unless such
5 action is brought by a county, in which case ~~it--may--be~~
6 ~~commenced--and--tried--in~~ any county not a party thereto is
7 also a proper place of trial."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 15. Section 2-9-312, MCA, is amended to read:

2 "2-9-312. Venue-of-actions Against state and political
3 subdivisions. (1) Actions The proper place of trial for an
4 action against the state ~~shall-be-brought~~ is in the county
5 in which the ~~cause--of-action~~ claim arose or in Lewis and
6 Clark County. In addition, an action brought by a resident
7 of the state, ~~may--bring--an--action--in~~ the county of his
8 residence is also a proper place of trial.

9 (2) Actions The proper place of trial for an action
10 against a political subdivision ~~shall-be-brought~~ is in the
11 county in which the ~~cause-of-action~~ claim arose or in any
12 county where the political subdivision is located."

Explanation: Amended to conform to the rest of the bill in terminology for inclusion into Title 25, chapter 2, part 1. Section was originally enacted relating to sovereign immunity actions, but the Commission believes it should properly be moved to general venue provisions.

1 NEW SECTION. Section 16. Specific statutes control.
2 The provisions of this part do not repeal, by implication or
3 otherwise, specific statutes not within this part,
4 designating a proper place of trial, whether or not such a
5 designation is called venue or proper place of trial.

Explanation: This section is to reaffirm that general venue statutes, even though they are later enactments, are not intended to disturb specific code sections establishing venue. In such cases the specific statute not within Title 25, chapter 2, part 1 is controlling.

1 NEW SECTION. Section 18. Repealer. Section 25-2-107,
2 MCA, is repealed.

25-2-107. Actions in which defendant is about to depart. If any defendant or defendants may be about to depart from the state, the action may be tried in any county where either of the parties may reside or service be had, subject, however, to the power of the court to change the place of trial as provided in this code.

Explanation: This section is redundant and repeal prevents possible confusion. A plaintiff may file an action in any county, whether or not the defendant is about to depart the state, and the defendant may move to move the place of trial. The long-arm statutes have eliminated the necessity for a quick filing for fast service in any case.

(This sheet to be used by those testifying on a bill.)

NAME: PAT MELBY DATE: 1-22-85

ADDRESS: 4th Floor Montana Club, P.O. Box 1144 Helena 59602

PHONE: 442-7450

REPRESENTING WHOM? State Bar of Montana

APPEARING ON WHICH PROPOSAL: S.B. 91

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENT: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 012285

BILL NO. SB 91

STANDING COMMITTEE REPORT

January 22 19 85

MR. PRESIDENT

We, your committee on JUDICIARY
having had under consideration SENATE BILL No. 91
first reading copy (white)
color

GENERAL REVISION AND CLARIFICATION OF VERMONT STATUTES

Respectfully report as follows: That SENATE BILL No. 91

DO PASS

DO NOT PASS

Chairman.

STATUS SHEETFORTY-NINTH

LEGISLATIVE SESSION

COMMITTEE ON JUDICIARY

SENATE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CON- CURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CON- CURRED IN DATE
SB 5	1/18/85	3/7/85	2/7/85				2/7/85		
SB 26	1/19/85	3/11/85 3/12/85	(Tabled 3/12/85)	Reconsidered 3/28/85 and passed out with BE CONCURRED IN AS AMENDED					
SB 57	1/22/85	3/7/85	3/7/85				3/7/85		
SB 27	1/23/85	3/8/85	3/8/85				3/8/85		
SB 80	1/24/85	3/11/85	3/11/85				3/11/85		
SB 2	1/26/85	3/6/85 3/7/85	(TABLED 3/7/85)						
SB 3	1/28/85	3/6/85 3/7/85	3/7/85				3/7/85		
SB 85	1/28/85	3/8/85	3/11/85				3/8/85		
SB 90	1/28/85	3/8/85 3/11/85	3/11/85					3/11/85	
SB 91	1/28/85	3/7/85 3/8/85	3/8/85					3/8/85	
SB 60	1/29/85	3/7/85 3/8/85	3/8/85				3/8/85		
SB 87	1/29/85	3/7/85	3/7/85				3/7/85		
SB 28	2/27/85	3/12/85 3/22/85	3/22/85					3/22/85	
SB 54	2/27/85	3/12/85	3/12/85					3/12/85	
SB 89	2/27/85	3/12/85 3/19/85	3/19/85					3/19/85	
SB 104	2/27/85	3/11/85	3/11/85				3/11/85		

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 7, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Thursday, March 7, 1985 in Room 312-3 of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Gould who had previously been excused.

CONSIDERATION OF SENATE BILL NO. 57: Senator Max Conover, District #42, sponsor of SB 57, testified in its support. This is an act providing for the attachment of a donor's statement under the Uniform Anatomical Gift Act to the back of the motor vehicle operator's or chauffeur's license. A copy of Senator Conover's written testimony was marked Exhibit A and attached hereto. He also submitted a copy of some questions and answers about organ donations which was marked Exhibit B and attached. Also submitted was an article from the Daily Inter-Lake, Kalispell, dealing with the shortage of donated organs. See Exhibit C.

Also testifying was Larry Majerus, administrator of the Motor Vehicle Division of the Department of Justice, pointed out that the division opposed this bill in the Senate because they felt it was not at all workable. Mr. Majerus still has some concern with the bill which he expressed. He said they have a present system already in force. The division issues a separate donor card. On one side of the card, there is information stating what organs the donor would like to donate, and the required signatures, dates and witnesses are listed on the back side. He passed out several cards and driver's licenses for the committee's view. He said that the division will have difficulty getting the information that is needed on the license -- especially if a particular license already has a change of address or other restrictions already placed on the back of the card.

There being no questions from the committee, hearing closed on SB 57.

CONSIDERATION OF SENATE BILL NO. 91: Senator Joe Mazurek, District #23, sponsor of SB 91, testified. He submitted a section-by-section summary of the intent of SB 91 of which a copy was marked Exhibit D and attached hereto.

Senator Masurek stated that Sam Haddon, chairman of the Supreme Court Commission on the Rules of Evidence, had planned to be present to testify, but he was unable to do so because of conflict.

William F. Crowley, professor at the Montana Law School and also a member of the Evidence Commission, testified as a proponent to SB 91. He stated he was the principal draftsman of SB 91. He said this is one of the last of the sections of our civil procedure act. He said this system has not been looked at and updated yet. These statutes were passed before Montana was even a state. It is not so much that the present statutes are wrong as they are written in old-fashioned language and don't go over everything. If this bill passes, this will enable lawyers to go to the codes instead of caselaw and find all the basic rules there.

Pat Melby, representing the State Bar of Montana, testified that he supported the bill for all the reasons stated by Senator Masurek and Professor Crowley.

Michael Abley, administrator of the Montana Supreme Court, stated that the court is very much in favor of this bill, and feel the bill is long overdue.

Karl Englund, representing the Montana Trial Lawyers Association, wished to go on record as supporting this legislation.

There being no further proponents or opponents, Rep. Masurek closed by saying that SB 91 is a law student relief bill.

There were a few general questions asked, and the hearing on SB 91 was closed.

CONSIDERATION OF SENATE BILL NO. 60: Senator Joe Masurek, District #23, sponsor of the bill, testified. He stated that this bill is a uniform act. It is replacing the existing Uniform Gifts to Minors Act with the Uniform Transfers to Minors Act. The Uniform Gift to Minors Act was adopted in Montana in 1957. The original Uniform Gifts to Minors Act applied to very limited types of property -- cash and securities. This bill updates the former law, modernizes it and makes it more useable in today's world. Senator Masurek pointed out the change the Senate made on page 1 by decreasing the age of 21 to 18 years because they felt it would present a conflict with the Montana Constitution which establishes the age of majority at 18 years of age. Senator Masurek said that SB 60 has gone through substantial review. He further stated that the National Conference of Commissioners on Uniform State Laws feels that uniformity is important in this area.

SB 91

Exhibit D
3/7/85

Recommendations for Revisions in Venue Statutes
Prepared by the Montana Supreme Court Commission
on the Rules of Evidence

PREFACE

This report and the accompanying draft bill are submitted to partially fulfill the request of Senate Joint Resolution 24 of the 48th Legislature that the Supreme Court Commission on the Rules of Evidence prepare draft legislation for submission to the 49th Legislature to provide that "statutory provisions on venue . . . accurately reflect the current usages and interpretations of those laws"

The Resolution recognized that the existing statutes "no longer reflect on their face the present state of the law," and expressed a desire that new draft statutes be prepared incorporating the "logical, useful, and consistent" rules and practices which have evolved by judicial construction of the present laws.

The current venue statutes were adopted in 1864 at Bannack and are substantially the same today as when they were enacted. Throughout the 120 years of their existence these venue statutes have been the subject of dozens, perhaps hundreds, of appeals to the Montana Supreme Court. Many of the appeals were caused by the silence of the statutes on principles necessary to their operation; other appeals resulted from the ambiguity of certain fundamental language. The commands of various venue sections that particular kinds of cases "shall," "may," or "must" be tried in specified counties resulted in seemingly unending litigation. Concerning one of these sections, Justice Sheehy, writing for a unanimous court, complained in 1978:

Possibly no statute has spawned more litigation in this state than section 93-2904 relating to the proper place of trial. Year after year we are called upon to interpret anew what are seemingly simple code provisions and to explain again the impact of our decisions under the statute. (Clark Fork Paving, Inc. v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779.)

Justice Sheehy went on to extract, from what he termed "the mountain of cases which have arisen," the long-standing rules that decided the issue, and restated them for the thirtieth or fortieth time.

The Clark Fork case illustrates the fundamental problem: basic rules exist but many cannot be found in the statutes. They must be located in, and sifted from, a "mountain of cases." When attorneys have not found the applicable Supreme Court opinion in the 190-odd volumes of Montana Reports (or hope that their opponents have not), the same legal questions are hauled before the Court again and again and again.

The new statutes proposed in this draft have three objectives:

(1) to include in the Montana Code Annotated those rules which have been declared and are settled by the Supreme Court but are not now stated in the Code;

(2) to change the language, without changing the meaning, of the sections that have caused the most litigation (primarily by substituting the designation "proper place of trial" for the ambiguous command that cases "shall," "may," or "must" be tried in particular counties);

(3) to settle the few matters where there is still a seeming ambiguity, following general principles along the lines that the Court seems to feel would be best derived from what the Court has held in other situations.

- 1 NEW SECTION. Section 1. Scope of part. The proper
- 2 place of trial (venue) of a civil action is in the county or
- 3 counties designated in this part.

Explanation: The only purpose of this section is clarity. It is simply an expression of the fundamental principle incorporated but unstated in the present Code and its predecessors.

- 1 NEW SECTION. Section 2. Designation of proper place
- 2 of trial not jurisdictional. The designation of a county in
- 3 this part as a proper place of trial is not jurisdictional
- 4 and does not prohibit the trial of any cause in any court of
- 5 this state having jurisdiction.

Explanation: This new section is intended to codify the results of a series of cases dealing with recurrent problems caused by the form and language of the current statutes. Although intended

only to set rules of venue, the phrasing of the present statutes has caused many litigants to believe they prescribe jurisdictional requirements. The Supreme Court has had to rule repeatedly that these statutes do not in any way affect the jurisdiction of District Courts to try cases brought before them. All District Courts have equal power to try any action of which the district courts, as a group, have jurisdiction (Miller v. Miller, ___ Mont. ___, 616 P.2d 313 (1980); State ex rel. Foster v. Mountjoy, 83 Mont. 162, 271 P. 446 (1928)). Even if a court is not the proper one as designated by the venue statutes, it can try a case if there is no objection from a party through a motion for a change of venue (Miller v. Miller, supra; Bullard v. Zimmerman, 82 Mont. 434, 268 P. 512 (1928)). Unless there is a demand by one of the parties, a court is not authorized to order the case transferred to another county or to refuse to try the case (State ex rel. Gnose v. District Court, 30 Mont. 188, 75 P. 1109 (1904); Danielson v. Danielson, 62 Mont. 83, 203 P. 506 (1921)).

Since these questions have arisen repeatedly over a long period of time, it seems sensible to include this or a similar provision to prevent endless recurrences in the future.

1 NEW SECTION. Section 3. Power of court to change
2 place of trial. The designation in this part of a proper
3 place of trial does not affect the power of a court to
4 change the place of a trial for the reasons stated in
5 25-2-201(2) or (3), or pursuant to an agreement of the
6 parties as provided in 25-2-202.

Explanation: This section is simply a consolidation into a single section a principle now expressed separately and not very clearly in each statute. Every venue statute now, after designating the proper county or counties for particular purposes, includes a provision that it is "subject, however, to the power of the court to change the place of trial as provided in this code." The Supreme Court has had to state on many occasions that the clause is intended only to preserve the trial courts' discretionary power of granting changes of venue to secure impartial trials or to promote convenience of witnesses or the ends of justice. The proposed section incorporates these declarations and should make the meaning clear.

1 NEW SECTION. Section 4. Right of defendant to move
2 for change of place of trial. If an action is brought in a
3 county not designated as the proper place of trial, a
4 defendant may move for a change of place of trial to a
5 designated county.

Explanation: This section and section 5 specify that the right to move for a change of place of trial on the ground that the action is brought in the wrong county belongs exclusively to a defendant. It might be argued that this right should extend to some other classes of litigants, such as involuntary plaintiffs under Rule 19(a), M.R.Civ.P. or some intervenors (Rule 24, M.R.Civ.P.). The courts have always held that such parties must accept the status of the ongoing action as they find it at the time of their entry. Further, Rule 12(b)(ii), M.R.Civ.P. provides that only defendants can move for a change of venue on this ground, which is consistent with all of the Supreme Court holdings.

1 NEW SECTION. Section 5. Multiple proper counties. If
2 this part designates more than one county as a proper place
3 of trial for any action, an action brought in any such
4 county is brought in a proper county, and no motion may be
5 granted to change the place of trial upon the ground that
6 the action is not brought in a proper county under
7 25-2-201(1). If an action is brought in a county not
8 designated as a proper place of trial, a defendant may move
9 for a change of place of trial to any of the designated
10 counties.

Explanation: Present statutes do not deal with this situation.

This section codifies a number of Supreme Court holdings that do. In many cases (particularly tort and contract actions) alternative venues are authorized, but the manner of choosing between them is not stated. A sizeable amount of litigation has resulted. All of the cases have held that the plaintiff has the initial choice and, if he selects a county that is proper, the issue is closed, but that if the plaintiff files the action in a county that is not one of those designated, he has waived the right to choose, which passes to the defendant. Defendant can then decide to which of the proper counties he wants the case transferred. Of the many cases dealing with the problem, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958), a tort action, gives the clearest statement:

In this case the statute means that either the county of defendant's residence or the county where the tort was committed is a proper county for the trial of the action, and had the plaintiff chosen either of those counties, the defendant could not have had it removed.

In this case plaintiff waived his right to have it tried in one of the proper counties. Therefore, the defendant has the right upon proper demand to have the place of trial changed either to the county where he resides or to the county where the tort was committed, whichever he elects.

This proposed section will preserve the rule of Seifert and other cases. It allows the plaintiff first choice among the proper venues and provides that a correct choice by him cannot be changed. If the plaintiff's selection is not one of the designated counties, the initiative passes to the defendant. He can move for a change to the proper county of his choice, and section 25-2-201 MCA requires that the trial court grant the motion.

1 NEW SECTION. Section 6. Multiple claims. In an action
2 involving two or more claims for which this part designates
3 more than one as a proper place of trial, a party entitled
4 to a change of place of trial on any claim is entitled to a
5 change of place of trial on the entire action, subject to
6 the power of the court to separate claims or issues for

7 trial under Rule 42(b) of the Montana Rules of Civil
8 Procedure.

Explanation: The present statutes do not cover this situation. This section codifies the holdings of the Supreme Court in cases that have raised the question. Our statutes have no provision for the multiple claim situation in which the county where the plaintiff files is correct on one claim but not for one or more of the others. It is possible, at least since the adoption of Rule 42(b), for a court to split the action and grant a change on one or more claims, but this causes multiple trials and may be a cure worse than the disease. For a great many years our Court has ruled consistently that a defendant entitled to a change of venue on one claim should have it on the entire action. The Court feels the rule is necessary to prevent a plaintiff from controlling venue by adding spurious claims that have little or no validity, but are triable in the forum the plaintiff chooses rather than at the normal situs which would be the defendant's residence or another location more favorable to the defendant.

This new provision codifies the result of this unbroken line of opinions: Yore v. Murphy, 10 Mont. 304, 25 P. 1039 (1891); Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933); Beavers v. Rankin, 142 Mont. 570, 385 P.2d 640 (1963). It makes no change in existing law, but simply enacts it into the Code where it is available.

1 NEW SECTION. Section 7. Multiple defendants. If there
2 are two or more defendants in an action, a county that is a
3 proper place of trial for any defendant is proper for all
4 defendants, subject to the power of the court to order
5 separate trials under Rule 42(b) of the Montana Rules of
6 Civil Procedure. If an action with two or more defendants is
7 brought in a county that is not a proper place of trial for
8 any of the defendants, any defendant may make a motion for
9 change of place of trial to any county which is a proper
10 place of trial.

Explanation: On a few occasions, the Supreme Court has had to deal with the problem posed by multiple defendants with conflicting venue rights. Most situations involve defendants who live in different counties, but this presents no difficulty since the statutes (Section 25-2-108 MCA; amended in section 7 of this draft) have always allowed the plaintiff to file at the residence of any of them. Tort, contract, and real property actions, however, which present choices other than residence, have been troublesome. Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933) raised but did not give a definitive answer to the question of possible priorities between defendants whose venue rights arise under different statutory provisions. That case involved contract, tort, and real property claims, and was brought at the plaintiff's residence where none of the defendants lived. The Court held that the action was basically one for recovery of real property, to which the tort and contract claims were subsidiary. Since all of the defendants were residents of the county where the land was situated, a change of venue to that county was awarded. The court noted that small differences in the facts might have presented much more complex questions. These questions are what this proposed section attempts to meet. The section would simply extend the same "good as to one, good as to all" principle that has always governed venue based on residence to all situations. Rule 42(b), which was not available at the time of the Heinecke case, could be used to alleviate the difficulties of a defendant placed at a real disadvantage.

This proposed section does not change existing law or establish any new principle. Like the other new provisions it simply tries to codify existing case law (although, in this instance, cases are neither plentiful nor clear-cut) so that all the fundamental principles will be gathered together in one place and stated as plainly as possible.

- 1 Section 8. Section 25-2-108, MCA, is amended to read:
- 2 "25-2-108. ~~Other--actions~~ Residence of defendant. In
- 3 ~~all--other--cases,--the--action--shall--be--tried--in~~ Unless
- 4 otherwise specified in this part:
- 5 (1) the proper place of trial for all civil actions is
- 6 the county in which the defendants or any of them may reside

7 at the commencement of the action ~~or where the plaintiff~~
8 ~~resides and the defendants or any of them may be found; or~~
9 (2) if none of the defendants reside in the state, ~~or~~
10 ~~if residing in the state, the county in which they so reside~~
11 ~~be unknown to the plaintiff, the same may be tried in any~~
12 ~~county which the plaintiff may designate in his complaint,~~
13 ~~subject, however, to the power of the court to change the~~
14 ~~place of trial as provided in this code~~ the proper place of
15 trial is any county the plaintiff designates in the
16 complaint."

Explanation: This revised section changes the location and arrangement of the most basic rules but does not alter their content significantly. Currently, section 25-2-108, which states the most fundamental of all venue rules--that the defendant has the right to have the trial in his county of residence--is the last section in Part 1, Chapter 2, Title 25, preceded by a long list of exceptions to it. The sequence is confusing and has caused much needless litigation. This revision tries to put first things first, beginning with the most fundamental proposition, and following it with the exceptions.

Subsection (1). This subsection extracts from the confusing welter of statutes what the Supreme Court has repeatedly called the "principal rule" of venue (see Hardenburgh v. Hardenburgh, 115 Mont. 46, 146 P.2d 151 (1944); Love v. Mon-O-Co Oil Corp., 133 Mont. 56, 319 P.2d 1056 (1957); Clark Fork Paving v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779 (1978)) and places it at the beginning, rather than the end, of the related group of rules. The proper relationship between this principle and others that are subordinate to it has generated most of what Justice Sheehy, in Clark Fork Paving, called the "mountain of cases" that the present statutes have spawned. This new order and placement is intended to emphasize the pre-eminence of this rule and the Court's repeated insistence upon it.

The stricken material "or where the plaintiff resides and the defendants or any of them may be found" at the end of subsection (1) is part of the current rule, but, in the judgment of the Commission, should be eliminated entirely. This deletion constitutes a substantive change in current law, the only such change in the draft bill. Unlike the fundamental principle to which it

is attached, this separate method of fixing venue is legally questionable and almost never used except in domestic relations actions. As a built-in exception to the rule that a defendant is entitled to trial in his own county, it is an open invitation to subterfuge and sharp practice by plaintiffs' attorneys, and was so characterized in the single case construing it that has reached the Supreme Court. By a 3-2 decision in Shields v. Shields, 115 Mont. 146, 139 P.2d 528 (1943) the Court held that this portion of the statute permitted a plaintiff to keep a divorce case in his own home county rather than that of the defendant by serving her when she had to leave her home county and come to the plaintiff's in connection with other litigation between them. The two dissenting judges called the plaintiff's action fraudulent. They argued that the provision was intended to be used only when the defendant had no residence in Montana, or had one but could not be found there. The dissenters' contention, though it did not prevail, apparently cast so much doubt on the practice that it has never again, in over 40 years, come before the Supreme Court. The Commission recognizes that this deleted language is often used in domestic relations cases; to preserve this existing use, similar language could be incorporated into 40-4-105(3), MCA. The situation for child custody is covered in 40-4-211, MCA.

The legitimate uses of the deleted language--to set venue in the cases of non-residents or residents whose whereabouts cannot be ascertained--are substantially covered by subsection (2) of the current draft.

Subsection (2). This provision clarifies the portion of section 25-2-108 dealing with nonresident defendants. Since, by definition, a nonresident of the state is not resident in any county, the basic rule of subsection (1) cannot apply. In this situation the statute has always given the right of choosing venue to the plaintiff, and this draft contemplates no change.

Most of the litigation under this provision has dealt with nonresident corporations. An unbroken chain of decisions holds that a foreign corporation has no Montana residence for venue purposes, can be sued in any county selected by the plaintiff, and has no right to a change of venue for improper county (Pue v. Northern Pacific Ry. Co., 78 Mont. 40, 252 P. 313 (1926); Hanlon v. Great Northern Ry. Co., 83 Mont. 15, 268 P. 547 (1928); Truck Insurance Exchange v. NEF Property and Casualty, 149 Mont. 387, 427 P.2d 50 (1967); Foley v. General Motors Corp., 159 Mont. 469, 499 P.2d 774 (1972)). Since, under this statute, any county selected by the plaintiff is a proper place of trial, a nonresident is not entitled to a change even in those instances, like tort and contract actions, where alternative venues are authorized (Morgan and Oswood v. U. S. F. & G., 167 Mont. 64, 535 P.2d 170 (1975)).

All of the existing case holdings would be undisturbed by subsection (2). The law will remain just as it is.

It should be noted that subsection (2) applies only to the nonresident and does not affect the rights of a resident who may be joined as co-defendant with the nonresident. The resident retains whatever rights he may have to a venue change (Foley v. General Motors Corp., supra).

The stricken language providing for designation of a proper county by a plaintiff was deleted as redundant with section 4. A plaintiff, whether he knows the residence of the defendant or not, may file in any county subject to defendant's right to move the trial.

1 Section 9. Section 25-2-101, MCA, is amended to read:

2 "25-2-101. ~~Contract-actions~~ Contracts. Actions (1) The
3 proper place of trial for actions upon contracts may be
4 tried-in is either:

5 (a) the county in which the defendants, or any of
6 them, reside at the commencement of the action; or

7 (b) the county in which the contract was to be
8 performed; subject; however; to the power of the court to
9 change the place of trial as provided in this code. The
10 county in which the contract was to be performed is:

11 (i) the county named in the contract as the place of
12 performance; or

13 (ii) if no county is named in the contract as the place
14 of performance, the county in which, by necessary
15 implication from the terms of the contract, considering all
16 of the obligations of all parties at the time of its
17 execution, the principal activity was to take place.

18 (2) Subsections (2)(a) through (2)(d) do not
19 constitute a complete list of classes of contracts; if,
20 however, a contract belongs to one of the following classes,
21 the proper county for such a contract for the purposes of
22 subsection (1)(b)(ii) is:

23 (a) contracts for the sale of property or goods: the
24 county where possession of the property or goods is to be
25 delivered;

26 (b) contracts of employment or for the performance of
27 services: the county where the labor or services are to be
28 performed;

29 (c) contracts of indemnity or insurance: the county
30 where the loss or injury occurs or where a judgment is
31 obtained against the assured or indemnitee or where payment
32 is to be made by the insurer;

33 (d) contracts for construction or repair: the county
34 where the object to be constructed or repaired is situated
35 or is to be built."

Explanation: Present section 25-2-101 was, until the recodification of 1979, part of section 93-2904, RCM 1947, which lumped together in a single paragraph the basic rule of venue and all its major exceptions. This was the provision about which Justice Sheehy said, in Clark Fork Paving v. Atlas Concrete, 178 Mont. 3, 582 P.2d 779 (1978), "Possibly no statute has spawned more litigation in this state" The portion that has become section 25-2-101 was the focus of a major portion of that litigation.

The original intent of the "contract exception" to the general rule placing venue at the residence of the defendant was to permit an alternative place of trial. The plaintiff could, if he chose, elect to file his action in the county where the contract was to be performed rather than at defendant's residence. The

Supreme Court, however, in Interstate Lumber Co. v. District Court, 54 Mont. 602, 172 P. 1030 (1918), held that the word "may" in the statute meant "must" and construed the provision to mean that contract actions were properly triable only in the county of performance. This decision, in conjunction with the earlier case of State ex rel. Coburn v. District Court, 41 Mont. 84, 103 P. 144 (1910), which had ruled that the place of performance of all contracts calling for payment of money was at the place of the payment, effectively established the venue of practically all contract actions at the plaintiff's, rather than the defendant's, residence. The Coburn and Interstate Lumber cases were overruled in Hardenburgh v. Hardenburgh, 115 Mont. 469, 146 P.2d 151 (1944) which decided that "may" means "may" rather than "must" and set out rules for determining the place of performance of various types of contracts that have been followed down to the present.

The last sentence of subsection (1)(b) and subsection (2) through the end of the section is an attempt to codify the results of an extensive line of cases dealing with the problems created by section 25-2-101, MCA, and its predecessor, particularly those cases struggling with the meaning of the "place of performance" language of the statutes.

The contract venue statutes since their beginning have clearly intended to allow alternative venues when a contract is to be performed in a county other than the one where the defendant lives, but they have not proven easy to apply. Although the Hardenburgh case got rid of an obviously erroneous interpretation that had robbed the alternative provision of much of its benefit, the decision did not settle all the problems. Determining the place where a contract is to be performed is frequently not an easy task. Most contracts call for a monetary payment of some sort, and when, under the Coburn and Interstate Lumber cases, this was made the single determinative factor, the location was normally clear. After those decisions were changed, that certainty disappeared. The Hardenburgh court, anticipating the difficulties that could result, laid down a succession of interpretive rules which have generally been followed and developed in later cases.

This portion of the section seeks to state the case rules in a form as brief and complete as possible although, in dealing with a series of court opinions that are lengthy and diverse, and extend over a period of 40 years, the rules are not always simple and clear.

The Hardenburgh rules establish a basic framework. If a contract specifies a place of performance, the matter is settled; the courts will accept the designation. Where the contract is not specific, the court will look to see whether the contract allows performance to occur only at a particular site. If so, that is the location "by necessary implication." Some of these determinations are reasonably simple, others complex. In the uncomplicated category are such cases as Colbert Drug v. Electrical Products, 106 Mont. 11, 74 P.2d 437 (1937) where the contract, although it did not specify any county as the place of perfor-

mance, was to maintain neon signs in Butte; Thomas v. Cloyd, 110 Mont. 343, 100 P.2d 938 (1940) in which the defendant contracted to secure employment for the plaintiff in Butte; and Love v. Mon-O-Co Oil, 133 Mont. 56, 319 P.2d 1056 (1958), an action on a contract to drill an oil well on a described tract of land which lay in Fallon county. In each case the Court found a county of performance specified by necessary implication.

Where both parties have duties and obligations which must be carried out at different locations, fixing the place of performance becomes more difficult. Before Hardenburgh, place of payment was the sole determining factor in most cases. After Hardenburgh, the court, in a search for a similar touchstone, experimented with a number of factors; place of negotiation, place of execution, place of payment, or some combination of them. Ultimately, it settled on the "county of activity," that is, the county where the primary purpose of the contract was to be accomplished.

Determining "county of activity" as outlined in the series of cases which fixed this as the test, involves several steps. It begins with a consideration of all the duties and obligations of all the parties (Hardenburgh); then the court seeks to determine the ultimate purpose to be achieved and decide which of the various acts are primary and which subsidiary to that purpose. The county where the primary actions are to be performed is the county of activity. The process was most clearly demonstrated in Brown v. First Federal Savings and Loan, 144 Mont. 149, 394 P.2d 1017 (1964), which also contains the clearest expression of the principle. The plaintiffs, residents of Lewis and Clark County, received a loan from the defendant loan association to build a house in Helena. The association's office was in Great Falls; the loan was made there, payments were to be received there, the contractors and subcontractors were to be supervised and paid from there, and all the financial activities performed there. The actual construction, however, was all in Lewis and Clark County. The plaintiffs' action was for breach of defendant's obligations to supervise and pay the contractors properly. Defendants claimed venue was in Cascade County because the suit concerned duties to be performed there. Plaintiffs maintained that the contract existed primarily to build a house in Lewis and Clark County, and that was the proper county of performance. The Supreme Court held for the plaintiffs, saying, in part, "The theatre of performance, by necessary implication of what the parties intended as evidenced by the terms of the contract, is Helena."

Brown is one of a number of cases holding that it is the overall purpose of the contract, not the particular provision that is in contest in the action, which governs venue. It is also one of a series, again beginning with Hardenburgh, which have decided what what is "necessarily implied" about performance of particular

kinds of contracts. It is these rules that are set out in subsections (2)(a) through (2)(d) of the draft bill.

The lead-in to subsection (2) recognizes that the contracts named in the subsection are not an exclusive list of contracts, but merely those in which a rule has evolved. The Commission does not intend to require that all contracts somehow be pigeon-holed into one of the categories to establish venue. Contracts not within the list are subject to analysis under subsection (1)(b)(ii) to establish venue.

Subsection (2)(a) incorporates the holding of the Hardenburgh case, which involved the sale of a business and included real and personal, tangible and intangible property; McNussen v. Graybeal, 141 Mont. 571, 380 P.2d 575 (1963) dealing with sale of milk produced and gathered in Lake county but sold in Missoula (venue was held to be in Missoula county where delivery and sale was made); and Hopkins v. Scottie Homes, 180 Mont. 498, 591 P.2d 230 (1979) where a mobile home was financed and sold in Valley county for delivery and erection in Musselshell county (venue lay in Musselshell county where delivery was to be made and the home set up).

Subsection (2)(b) adopts the rule declared in Hardenburgh for employment contracts. The Hardenburgh decision specifically overruled the portion of State ex rel. Coburn v. District Court, 41 Mont. 84, 108 P. 145 (1910) which had held that the venue of any contract calling for payment of money was at the residence of the creditor, but adopted the holding of Coburn that the place of performance of a labor contract was the place where the labor or services were to be performed. No subsequent cases have dealt with the question, so the basic rule of Coburn and Hardenburgh is clearly in force and is expressed in this subsection.

Subsection (2)(c) sets out the "insurance and indemnity" rule expressed in Hardenburgh, Hartford Accident and Indemnity Co. v. Viken, 157 Mont. 93, 483 P.2d 266 (1971), and General Insurance Co. v. Town Pump, ____ Mont. ____, 640 P.2d 463 (1982). Hardenburgh did not deal with insurance, so its discussion of the subject is technically dictum, but the Court was trying to deal with all the implications of the basic change it had made by overruling the Coburn and Interstate Lumber cases. The later Hartford and General Insurance opinions adopted Hardenburgh's rationale and applied it to the insurance contracts at issue in those cases. Using the "principal activity" test of Brown v. First Federal, supra, the Court in Hartford ruled that the performance called for in an insurance or indemnity contract is payment by the insurer on the happening of the named contingency. General Insurance made this doctrine more specific by holding that the place of performance of an insurance contract covering property in a number of different locations was in the county where the particular property involved in the claim at issue was situated.

The language of subsection (2)(c) is taken from the opinions in the Hardenburgh and Hartford cases.

Subsection (2)(d) is the rule of Brown v. First Federal, supra. Brown dealt with a contract for the original construction of a building, but the conclusion seems inescapable that its rationale is equally applicable to repair contracts, so they are included.

Note: Not all of the cases construing the contract exception to the basic venue rule, even those beginning with Hardenburgh, are totally reconcilable. Considering their numbers, it would be a miracle if they were. This proposed section is based on the large majority of the cases, which includes all of those that are most detailed and thoroughly considered, holding that contract venue lies in the county where the principal activity is to take place. A few opinions seem to state that a contract can have more than one place of performance, depending on the part of the contract sought to be enforced or the purpose of the specific litigation. These cases ignore the statutory language referring to the county in which the contract was to be performed, and are an open invitation to continue the endless round of litigation that the contract exception has spawned in the past. The proposed section therefore presumes a single place of performance of any contract, located in the county of its principal activity.

This proposal would follow and reaffirm Hardenburgh, Brown, McNussen v. Graybeal, and Hopkins v. Scottie Homes, but reject the rule of Peenstra v. Berek, ___ Mont. ___, 614 P.2d 521, which held that a contract for sale of goods was divisible into separate performances by buyer and seller. Each was to occur in a different county--the seller was to deliver the goods in the buyer's county, and the buyer was to make payments in the seller's county. Since the seller's performance was complete and he had brought the action for payment, the Court said, venue lay in the county where the buyer was to perform by making payment. Peenstra casts doubt on the entire sequence of decisions since Hardenburgh and throws the law back into uncertainty. The proposed section rejects it and any other decisions based on a "multiple performance" concept.

1 Section 10. Section 25-2-102, MCA, is amended to read:
2 "25-2-102. ~~Tort-actions~~ Torts. ~~Actions--for-torts--may~~
3 ~~be--tried-in-the~~ The proper place of trial for a tort action
4 is:
5 (1) The county in which the defendants, or any of
6 them, reside at the commencement of the action; or
7 (2) The county where the tort was committed~~7-subject7~~
8 ~~however7-to-the-power-of-the-court-to-change--the--place--of~~
9 ~~trial--as-provided-in-this-code.~~ If the tort is interrelated
10 with and dependent upon a claim for breach of contract, the
11 tort is committed, for the purpose of determining the proper
12 place of trial, in the county where the contract was to be
13 performed."

Explanation: This section changes the form but not the substance of the tort exception to the basic venue rule, and adds, in the last sentence of subsection (2), the essence of the Supreme Court's holding in Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974).

The present language of section 25-2-102, like the identical wording of the contract exception, that the action "may be tried" in the county where the tort was committed, has contributed to the "mountain of cases" that Justice Sheehy complained of in the Clark Fork Paving case. The principal case, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958) followed the Hardenburgh interpretation--that the language was permissive and created an alternative to the basic rule that venue lies at the defendant's residence. This holding has not been seriously questioned since it was handed down. It accords with the contract cases and makes the interpretation uniform.

The problems that arose after Seifert were in fixing the situs of torts that involved no physical injury. Three times in 10 years the Supreme Court had to determine the county where torts would be held to be committed if they arose from a business relationship (Brown v. First Federal, supra; Foley v. General Motors, 159 Mont. 469, 499 P.2d 774 (1972); Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974)). The common factor in all the cases was the existence of a contract between the parties, out of which the tort was claimed to have sprung.

In Brown and Foley the question was not reached because other considerations were decisive, but the issue was central and squarely presented in Slovak. The Court decided that in tort actions arising from contractual relationships, the tort has the same situs, for venue purposes, as the contract.

This proposed section codifies the rules of Seifert and Slovak.

1 Section 11. Section 25-2-103, MCA, is amended to read:

2 "25-2-103. ~~Actions-involving-real~~ Real property. (1)

3 ~~Actions~~ The proper place of trial for the following causes
4 ~~must-be-tried-in actions is~~ the county in which the subject
5 of the action or some part thereof is situated, ~~subject to~~
6 ~~the power of the court to change the place of trial as~~
7 ~~provided in this code:~~

8 (a) for the recovery of real property or of an estate
9 or an interest therein or for the determination, in any
10 form, of such right or interest;

11 (b) for injuries to real property;

12 (c) for the partition of real property;

13 (d) for the foreclosure of all liens and mortgages on
14 real property.

15 (2) Where the real property is situated partly in one
16 county and partly in another, the plaintiff may select
17 either of the counties and the county so selected is the
18 proper county for the trial of such action.

19 (3) ~~All~~ The proper place of trial for all actions for

20 the recovery of the possession of, quieting the title to, or
21 the enforcement of liens upon real property ~~must---be~~
22 ~~commenced--in~~ is the county in which the real property, or
23 any part thereof, affected by such action or actions is
24 situated."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 12. Section 25-2-104, MCA, is amended to read:
2 "25-2-104. ~~Actions--to--recover~~ Recovery of statutory
3 penalty or forfeiture. ~~Actions~~ The proper place of trial for
4 the recovery of a penalty or forfeiture imposed by statute
5 ~~must---be-tried-in~~ is the county where the cause or some part
6 thereof arose, ~~subject-to-the-power-of-the-court--to--change~~
7 ~~the--place--of--trial;~~ except that when it is imposed for an
8 offense committed on a lake, river, or other stream of water
9 situated in two or more counties, the action may be brought
10 in any county bordering on such lake, river, or stream and
11 opposite to the place where the offense was committed."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 13. Section 25-2-105, MCA, is amended to read:
2 "25-2-105. ~~Actions-against~~ Against public officers or
3 their agents. ~~Actions~~ The proper place of trial for an
4 action against a public officer or person specially
5 appointed to execute his duties for an act done by him in
6 virtue of his office or against a person who, by his command
7 or in his aid, does anything touching the duties of such
8 officer ~~must--be--tried--in~~ is the county where the cause or
9 some part thereof arose, ~~subject-to-the-power-of--the--court~~
10 ~~to-change-the-place-of-trial.~~"

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 14. Section 25-2-106, MCA, is amended to read:
2 "25-2-106. ~~Actions--against~~ Against counties. ~~An~~ The
3 proper place of trial for an action against a county ~~may--be~~
4 ~~commenced--and--tried--in--such~~ is that county unless such
5 action is brought by a county, in which case ~~it--may--be~~
6 ~~commenced--and--tried--in~~ any county not a party thereto is
7 also a proper place of trial."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

1 Section 15. Section 2-9-312, MCA, is amended to read:
2 "2-9-312. Venue-of-actions Against state and political
3 subdivisions. (1) Actions The proper place of trial for an
4 action against the state ~~shall-be-brought~~ is in the county
5 in which the ~~cause--of-action~~ claim arose or in Lewis and
6 Clark County. In ~~addition,~~ an action brought by a resident
7 of the state, ~~may--bring--an--action--in~~ the county of his
8 residence is also a proper place of trial.
9 (2) Actions The proper place of trial for an action
10 against a political subdivision ~~shall-be-brought~~ is in the
11 county in which the ~~cause-of-action~~ claim arose or in any
12 county where the political subdivision is located."

Explanation: Amended to conform to the rest of the bill in terminology for inclusion into Title 25, chapter 2, part 1. Section was originally enacted relating to sovereign immunity actions, but the Commission believes it should properly be moved to general venue provisions.

1 NEW SECTION. Section 16. Specific statutes control.
2 The provisions of this part do not repeal, by implication or
3 otherwise, specific statutes not within this part,
4 designating a proper place of trial, whether or not such a
5 designation is called venue or proper place of trial.

Explanation: This section is to reaffirm that general venue statutes, even though they are later enactments, are not intended to disturb specific code sections establishing venue. In such cases the specific statute not within Title 25, chapter 2, part 1 is controlling.

1 NEW SECTION. Section 18. Repealer. Section 25-2-107,
2 MCA, is repealed.

25-2-107. Actions in which defendant is about to depart. If any defendant or defendants may be about to depart from the state, the action may be tried in any county where either of the parties may reside or service be had, subject, however, to the power of the court to change the place of trial as provided in this code.

Explanation: This section is redundant and repeal prevents possible confusion. A plaintiff may file an action in any county, whether or not the defendant is about to depart the state, and the defendant may move to move the place of trial. The long-arm statutes have eliminated the necessity for a quick filing for fast service in any case.

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 8, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Friday, March 8, 1985 at 9:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Gould who had been previously excused.

CONSIDERATION OF SENATE BILL NO. 27: Senator M. K. Daniels, District #24, sponsor of SB 27, testified in its support. Senate Bill No. 27 was introduced by request of the Joint Interim Subcommittee No. 3. This legislation is a somewhat minor step in the direction of court reform which would result in more uniform court actions and court results. The bill would require clerks of district court and deputy clerks of district court to attend orientation courses and training sessions conducted by the supreme court administrator.

Mike Abley, administrator of the Montana Supreme Court, testified as a proponent. He said the Clerk of Courts Association have pushed very strongly for this bill.

There being no further proponents or opponents, Senator Daniels closed.

The floor was opened to questioning.

In response to a question asked by Rep. Montayne, Mr. Abley stated that the major portion of the cost will go towards travel and per diem for the clerks.

Chairman Hannah referred to the fiscal note and asked if the note represents all clerks travelling to a course but does not represent any grants that are currently received that might reduce it. Mr. Abley stated that that was correct. Chairman Hannah wanted to know if Mr. Abley has any idea of how much grant money was raised during last year for these kinds of events. Mr. Abley replied \$6,000.

Rep. Eudaily asked if it weren't possible under the bill for the district judge to continue to excuse these clerks from attending these courses. Mr. Abley said that although they could, he pointed out that the clerks are pushing for this training, and it would be very unlikely for them to request the judges to excuse them on a continuing basis.

There being no further questions, hearing on SB 27 closed.

mination, there are not very many. In most states that have a reciprocal discovery procedure, it was created by the courts.

Rep. Rapp-Svrcek wanted to know how many of these things which are presently exempted in section 4 from disclosure are presently available. Mr. McGrath said that none of them are available to defense attorneys.

Rep. Addy is wondering if the concept of fairness might moderate the pursuit of truth. He feels that there needs to be a line drawn between truth and fairness. Would this bill permit discovery of the defendant's rebuttal witnesses? Mr. Connor said that it is not addressed in the bill.

Following further general questions, hearing closed on SB 90.

EXECUTIVE SESSION

An executive session was called at 11:25 a.m. to act on the bills in committee.

ACTION ON SENATE BILL NO. 27: Rep. Darko moved that SB 27 BE CONCURRED IN. The motion was seconded by Rep. Addy. The question was called, and the motion carried with Reps. Hannah and Brown dissenting. (Rep. Keyser and Rep. Grady were not present to vote.) Rep. Darko agreed to carrying the bill on the floor.

ACTION ON SENATE BILL NO. 85: Rep. Mercer moved that SB 85 BE CONCURRED IN. The motion was seconded by Rep. O'Hara. The question was called, and the motion carried with Reps. Brown, Montayne and Eudaily dissenting.

ACTION ON SENATE BILL NO. 91: Rep. Mercer moved that SB 91 BE CONCURRED IN. The motion was seconded by Rep. Bergene.

Rep. Krueger submitted amendments to SB 91 which he moved to adopt. He informed the committee that this particular language is adopted after the California law. The amendment is as follows:

1. Page 3, line 15.
Following: "(1)"
Insert: "except as provided in subsection (3),"
2. Page 4, line 1.
Following: "complaint"
Insert: "; (3) the proper place of trial of an action brought pursuant to Title 40, chapter 4 is the county in which the petitioner has resided during the 90 days preceding the commencement of the action"

The motion was seconded by Rep. Mercer, the question called,

and the motion to amend carried unanimously.

Rep. O'Hara moved that SB 91 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Bergene and carried unanimously.

ACTION ON SENATE BILL NO. 60: In response to a question from Rep. Eudaily, Brenda Desmond, committee researcher, referred to Page 21, lines 3 and 6 of the bill by stating the difference in ages was deliberate because the transfers under sections 6 and 7 are conceptually different from the transfers under sections 8 and 9. The transfers under 6 and 7 are of the type for which the transferee can obtain federal tax advantages. The custodianships created for the transfers under sections 8 and 9 are actually substitutes for conservatorships that otherwise would terminate when the minor attains the age of majority - 18.

Rep. O'Hara moved that SB 60 BE CONCURRED IN. The motion was seconded by Rep. Miles. The question was called, and the motion carried unanimously.

ACTION ON SENATE BILL NO. 90: Rep. Hammond moved that SB 90 BE CONCURRED IN. The motion was seconded by Rep. O'Hara.

Rep. Rapp-Svrcek moved to amend page 5, line 8 by striking the word "defendant" and inserting "accused". He also wished to amend page 5, line 10 following "prosecutor" by inserting ", and for good cause". Page 5, line 3 and line 25, the word "defendant" would also be stricken, and the word "accused" be inserted in lieu thereof. The motion was seconded by Rep. Mercer and carried unanimously.

Rep. Rapp-Svrcek further moved on page 8, line 4 to strike "a" and insert "the" and strike "that includes" and insert "of the prosecuting and defense attorneys". He further moved to strike subsections (a) and (b) in their entirety. The motion was seconded by Rep. Addy. Rep. Rapp-Svrcek stated that much of the material in subsections (a) and (b) is presently available under disclosure to defense attorneys.

Rep. Hannah pointed out that from what he remembered of the testimony, this material is not presently allowed. Mr. McGrath stated that this material is not presently allowed.

Rep. Addy spoke in support of this amendment. He said his concern is that by putting a long itemized list of items in the definition that will affect the exclusion, we may be enlarging upon the rulings of the courts in the past. He said the intent of the amendment is to limit things that are excluded from discovery to those things that the courts in the past have felt that can be excluded under the attorney work product rule. We are trying not to change what the courts have already decided. He feels the amendment brings us back to what courts have decided so far on this issue.

STANDING COMMITTEE REPORT

March 8

19... 85...

Speaker

MR.

We, your committee on Judiciary

having had under consideration Senate

Bill No. 91

Third reading copy (Blue)
color

GENERAL REVISION AND CLARIFICATION OF VENUE STATUTES

Respectfully report as follows: That Senate

Bill No. 91

be amended as follows:

1. Page 3, line 15.

Following: "(1)"

Insert: "except as provided in subsection (3),"

2. Page 4, line 1.

Following: "complaint"

Insert: "; (3) the proper place of trial of an action brought pursuant to Title 40, chapter 4 is the county in which the petitioner has resided during the 90 days preceding the commencement of the action"

AND AS AMENDED,
BE CONCURRED IN~~XXXXXX~~

SL 3/9

Tom Hannah

REP. TOM HANNAH,

Chairman.

SENATE BILL NO. 91

INTRODUCED BY MAZUREK

BY REQUEST OF THE MONTANA SUPREME COURT AND THE MONTANA
SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
CLARIFY THE PROVISIONS RELATING TO VENUE BY DEFINING WHAT
COUNTY IS A PROPER PLACE OF TRIAL FOR VARIOUS PARTIES AND
CIVIL ACTIONS; AMENDING SECTIONS 2-9-312, 25-2-101 THROUGH
25-2-106, AND 25-2-108, MCA; AND REPEALING SECTION 25-2-107,
MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Scope of part. The proper
place of trial (venue) of a civil action is in the county or
counties designated in this part.

NEW SECTION. Section 2. Designation of proper place
of trial not jurisdictional. The designation of a county in
this part as a proper place of trial is not jurisdictional
and does not prohibit the trial of any cause in any court of
this state having jurisdiction.

NEW SECTION. Section 3. Power of court to change
place of trial. The designation in this part of a proper
place of trial does not affect the power of a court to
change the place of a trial for the reasons stated in

25-2-201(2) or (3), or pursuant to an agreement of the
parties as provided in 25-2-202.

NEW SECTION. Section 4. Right of defendant to move
for change of place of trial. If an action is brought in a
county not designated as the proper place of trial, a
defendant may move for a change of place of trial to a
designated county.

NEW SECTION. Section 5. Multiple proper counties. If
this part designates more than one county as a proper place
of trial for any action, an action brought in any such
county is brought in a proper county and no motion may be
granted to change the place of trial upon the ground that
the action is not brought in a proper county under
25-2-201(1). If an action is brought in a county not
designated as a proper place of trial, a defendant may move
for a change of place of trial to any of the designated
counties.

NEW SECTION. Section 6. Multiple claims. In an action
involving two or more claims for which this part designates
more than one as a proper place of trial, a party entitled
to a change of place of trial on any claim is entitled to a
change of place of trial on the entire action, subject to
the power of the court to separate claims or issues for
trial under Rule 42(b) of the Montana Rules of Civil
Procedure.

NEW SECTION. Section 7. Multiple defendants. If there are two or more defendants in an action, a county that is a proper place of trial for any defendant is proper for all defendants, subject to the power of the court to order separate trials under Rule 42(b) of the Montana Rules of Civil Procedure. If an action with two or more defendants is brought in a county that is not a proper place of trial for any of the defendants, any defendant may make a motion for change of place of trial to any county which is a proper place of trial.

Section 8. Section 25-2-108, MCA, is amended to read:

"25-2-108. ~~Other--actions~~ Residence of defendant. In all other--cases,--the--action--shall--be--tried--in Unless otherwise specified in this part:

(1) EXCEPT AS PROVIDED IN SUBSECTION (3), the proper place of trial for all civil actions is the county in which the defendants or any of them may reside at the commencement of the action or--where--the--plaintiff--resides--and--the--defendants--or--any--of--them--may--be--found; or

(2) if none of the defendants reside in the state, or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be--tried--in--any county--which--the--plaintiff--may--designate--in--his--complaint, subject,--however,--to--the--power--of--the--court--to--change--the place--of--trial--as--provided--in--this--code the proper place of

trial is any county the plaintiff designates in the complaint;

(3) THE PROPER PLACE OF TRIAL OF AN ACTION BROUGHT PURSUANT TO TITLE 40, CHAPTER 4, IS THE COUNTY IN WHICH THE PETITIONER HAS RESIDED DURING THE 90 DAYS PRECEDING THE COMMENCEMENT OF THE ACTION."

Section 9. Section 25-2-101, MCA, is amended to read:

"25-2-101. ~~Contract-actions~~ Contracts. Actions (1) The proper place of trial for actions upon contracts may be tried in is either:

(a) the county in which the defendants, or any of them, reside at the commencement of the action; or

(b) the county in which the contract was to be performed, subject, however, to the power of the court to change the place of trial as provided in this code. The county in which the contract was to be performed is:

(i) the county named in the contract as the place of performance; or

(ii) if no county is named in the contract as the place of performance, the county in which, by necessary implication from the terms of the contract, considering all of the obligations of all parties at the time of its execution, the principal activity was to take place.

(2) Subsections (2)(a) through (2)(d) do not constitute a complete list of classes of contracts; if,

1 however, a contract belongs to one of the following classes,
 2 the proper county for such a contract for the purposes of
 3 subsection (1)(b)(ii) is:

4 (a) contracts for the sale of property or goods: the
 5 county where possession of the property or goods is to be
 6 delivered;

7 (b) contracts of employment or for the performance of
 8 services: the county where the labor or services are to be
 9 performed;

10 (c) contracts of indemnity or insurance: the county
 11 where the loss or injury occurred or where a judgment is
 12 obtained against the assured or indemnitee or where payment
 13 is to be made by the insurer;

14 (d) contracts for construction or repair: the county
 15 where the object to be constructed or repaired is situated
 16 or is to be built."

17 Section 10. Section 25-2-102, MCA, is amended to read:

18 "25-2-102. ~~Tort-actions~~ Torts. Actions--for-torts--may
 19 ~~be--tried-in-the~~ The proper place of trial for a tort action
 20 is:

21 (1) The county in which the defendants, or any of
 22 them, reside at the commencement of the action; or

23 (2) The county where the tort was committed;--subject;
 24 however,--to-the-power-of-the-court-to-change--the--place--of
 25 trial--as-provided-in-this-code. If the tort is interrelated

1 with and dependent upon a claim for breach of contract, the
 2 tort was committed, for the purpose of determining the
 3 proper place of trial, in the county where the contract was
 4 to be performed."

5 Section 11. Section 25-2-103, MCA, is amended to read:

6 "25-2-103. ~~Actions--involving--real~~ Real property. (1)
 7 ~~Actions~~ The proper place of trial for the following causes
 8 ~~must--be-tried-in~~ actions is the county in which the subject
 9 of the action or some part thereof is situated;--subject--to
 10 ~~the--power--of--the--court--to--change-the-place-of-trial-as~~
 11 ~~provided-in-this-code:~~

12 (a) for the recovery of real property or of an estate
 13 or an interest therein or for the determination, in any
 14 form, of such right or interest;

15 (b) for injuries to real property;

16 (c) for the partition of real property;

17 (d) for the foreclosure of all liens and mortgages on
 18 real property.

19 (2) Where the real property is situated partly in one
 20 county and partly in another, the plaintiff may select
 21 either of the counties and the county so selected is the
 22 proper county for the trial of such action.

23 (3) At The proper place of trial for all actions for
 24 the recovery of the possession of, quieting the title to, or
 25 the enforcement of liens upon real property must--be

1 ~~commenced-in~~ is the county in which the real property, or
 2 any part thereof, affected by such action or actions is
 3 situated."

4 Section 12. Section 25-2-104, MCA, is amended to read:

5 "25-2-104. ~~Actions-to-recover~~ Recovery of statutory
 6 penalty or forfeiture. ~~Actions~~ The proper place of trial for
 7 the recovery of a penalty or forfeiture imposed by statute
 8 ~~must-be-tried-in~~ is the county where the cause or some part
 9 thereof arose, ~~subject-to-the-power-of-the-court-to-change~~
 10 ~~the-place-of-trial~~, except that when it is imposed for an
 11 offense committed on a lake, river, or other stream of water
 12 situated in two or more counties, the action may be brought
 13 in any county bordering on such lake, river, or stream and
 14 opposite to the place where the offense was committed."

15 Section 13. Section 25-2-105, MCA, is amended to read:

16 "25-2-105. ~~Actions--against~~ Against public officers or
 17 their agents. ~~Actions~~ The proper place of trial for an
 18 action against a public officer or person specially
 19 appointed to execute his duties for an act done by him in
 20 virtue of his office or against a person who, by his command
 21 or in his aid, does anything touching the duties of such
 22 officer ~~must-be-tried-in~~ is the county where the cause or
 23 some part thereof arose, ~~subject-to-the-power-of-the-court~~
 24 ~~to-change-the-place-of-trial~~."

25 Section 14. Section 25-2-106, MCA, is amended to read:

1 "25-2-106. ~~Actions-against~~ Against counties. ~~An~~ The
 2 proper place of trial for an action against a county ~~may-be~~
 3 ~~commenced-and-tried-in--such~~ is that county unless such
 4 action is brought by a county, in which case ~~it-may-be~~
 5 ~~commenced-and-tried-in~~ any county not a party thereto is
 6 also a proper place of trial."

7 Section 15. Section 2-9-312, MCA, is amended to read:

8 "2-9-312. ~~Venue-of-actions~~ Against state and political
 9 subdivisions. (1) ~~Actions~~ The proper place of trial for an
 10 action against the state ~~shall-be-brought~~ is in the county
 11 in which the ~~cause-of-action~~ claim arose or in Lewis and
 12 Clark County. In ~~addition~~, an action brought by a resident
 13 of the state, ~~may-bring-an-action--in~~ the county of his
 14 residence is also a proper place of trial.

15 (2) ~~Actions~~ The proper place of trial for an action
 16 against a political subdivision ~~shall-be-brought~~ is in the
 17 county in which the ~~cause-of-action~~ claim arose or in any
 18 county where the political subdivision is located."

19 NEW SECTION. Section 16. Specific statutes control.
 20 The provisions of this part do not repeal, by implication or
 21 otherwise, specific statutes not within this part,
 22 designating a proper place of trial, whether or not such a
 23 designation is called venue or proper place of trial.

24 NEW SECTION. Section 17. Repealer. Section 25-2-107,
 25 MCA, is repealed.

1 NEW SECTION. Section 18. Codification instruction.

2 (1) Sections 1 through 7 and 16 are intended to be codified
3 as an integral part of Title 25, chapter 2, part 1, and the
4 provisions of Title 25, chapter 2, part 1, apply to sections
5 1 through 7 and 16.

6 (2) Section 2-9-312 is intended to be recodified as an
7 integral part of Title 25, chapter 2, part 1, and the
8 provisions of Title 25, chapter 2, part 1, apply to 2-9-312
9 as recodified.

-End-